41855

31 I.A. 148

MARIE GREENE, Plaintiff - Appellant, v. WALGREEN CO., a corporation, Defendant - Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment upon a directed verdict for defendant in a personal injury action.

There is no substantial dispute in the material evidence and our inquiry is whether the trial court correctly decided the legal questions which arose upon the facts.

Plaintiff, employed as a cashier by the defendant, became ill at work, asked for medicine which was given her by fellow employees, and suffered spasms and convulsions as a result of which she fell from a table where employees had placed her in plaintiff's store, severely injuring her shoulder. Medical testimony shows that she was given an over-dose of strychnine which caused the spasms and convulsions. The parties stipulated that plaintiff in her employment and the defendant were under the Workmen's Compensation Act. The vital question is whether plaintiff's injuries arose out of and in the course of her employment.

We shall first dispose of an evidentiary point. Plaintiff contends that the court erroneously admitted the original complaint against her and cites, Wenegar v. Bollenbach, 180 Ill.222, in support of her position. The original complaint alleged that defendant's custom was to administer medicine to employees who became ill in the store; that plaintiff became ill and requested medicine; that she had done so on other occasions and been administered to; that defendant had a duty to exercise pharmaceutical care so as not to injure her and had violated that duty by administering to her

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31 I.A. 148

[illegible]

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Plaintiff - Appellant,

v.

[illegible] CO., a corporation,

Defendant - Appellee.

Mr. Justice [illegible] delivered the opinion of the court.

This is an appeal by plaintiff from a judgment upon a directed verdict for defendant in a personal injury action.

There is no substantial dispute in the material evidence and our inquiry is whether the trial court correctly applied the legal questions which arose upon the facts.

Plaintiff, employed as a cutter by the defendant, became ill at work, asked for medicine which her plea not by telling employers, and suffered severe and convulsions as a result of which she fell from a table where employees had placed her in plaintiff's store, severely injuring her shoulder. Medical testimony showed that she was given an over-dose of strychnine which caused the spasms and convulsions. The parties stipulated that plaintiff in her employment and the defendant were under the Workmen's Compensation Act. The vital question is whether plaintiff's injuries arose out of and in the course of her employment.

We shall first discuss of an evidentiary point. Plaintiff contends that the court erroneously admitted the original complaint against her and others, Jensen v. Fellenbaum, 180 Ill.522, in support of her position. The original complaint alleged that defendant's course was to administer medicine to employees who became ill in the store; that plaintiff became ill and requested medicine; that she had done so on other occasions and been administered to; that defendant had a duty to exercise ordinary care so as not to injure her and was violated that duty by administering to her

medicine of excessive strychnine content; that defendant was negligent in placing her on the table from which it should have foreseen her convulsions would make her fall; that as a direct result of the strychnine producing convulsions, she fell and was injured. This count was dismissed by the plaintiff who filed an amended complaint relying on an alleged custom of defendant to administer to the sickness of customers who requested first aid or emergency attention. It is clear that by this amendment plaintiff sought to come within the rule of cases cited by her on the main points discussed hereinafter. In the Bollenbach case the evidence showed the attorney who prepared the disputed pleadings did so under a misapprehension of the facts. That factor is not present here and, according to recent decisions of this court, the ruling of the trial court was proper. Bennett v. Auditorium Bldg. Corp. 299 Ill. App. 139; Plodzien v. Meyool, 314 Ill. App. 40.

The trial court, after hearing the witnesses and permitting defendant to read plaintiff's original complaint in evidence, decided that plaintiff's injury arose out of and in the course of her employment as a matter of law, and, accordingly, her tort action was precluded by the act.

Plaintiff contends the question presented is novel in this State and relies upon Volk v. City of New York, 30 N. E. (2) 596 and Tullgren v. Amoskeag Mfg. Co., 82 N. H. 268. Defendant contends that our Supreme Court cases have decided the question and plaintiff's cases are inapplicable and not binding. In the Volk case, a nurse was given a decomposed morphine solution following sickness at her work, and the New York Court of Appeals in revereing the decision of a lower court held that the risk of the nurse's injury was one to which anyone receiving like treatment at the hospital would have been subjected; that the injury was not made

violation of consumer protection statutes; that defendant was negligent in leaving her car on the table from which it should have foreseen her grandchildren would make her fall; that as a direct result of the aforementioned proximate causation, the fall was injured. This court was dismissed by the plaintiff who filed an amended complaint relying on an alleged course of conduct to solicitation to the attorneys of customers who requested first aid or emergency attention. It is clear that at this amendment plaintiff sought to come within the rule of Bates which by her in the main private discussed herein. In the Bilderbach case the evidence showed the attorney who prepared the disputed pleadings did no under a misapprehension of the facts. That factor is not present here and, according to recent decisions of this court, the ruling of the trial court was proper. Cowdrick v. Industrial Life Ins. Co., 207 Ill. App. 1[illegible]; Fitzsimmons v. Lefkof, 414 Ill. App. 2d. [illegible] The trial court, after hearing the witnesses and carefully determine to read plaintiff's original complaint in evidence, decided that plaintiff's injury arose out of and in the course of her employment in a matter of law, and, accordingly, her last action was precluded by the act.

Plaintiff contends the question presented is moot in this case and relies upon Tate v. Lady of the Lake, [illegible] 2d and Tatlowe v. Insurance Mfr. Co., 40 [illegible] 2d. 2d. defendant contends that our Supreme Court cases have resolved the question and plaintiff's cases are inapplicable and not binding. In the Tate case, a nurse was given a discharged nonunion solicitor following discharge of her duty, and the Supreme Court of Illinois in reversing the decision of a lower court held that the plaintiff's injury was due to a tortious act which negatively resulting like treatment of the [illegible] [illegible]; that the injury was not [illegible]

more likely by the fact of her employment and that it did not arise out of or in the course of her employment. The nurse had been treated in the Nurses' Infirmary, where the ordinary person would not be treated and by virtue of her agreement of employment, which provided proper medical and surgical attention. The New Hampshire case decided that a master who assumes to aid a sick servant has the obligation to use care in treating the patient.

It appears from the evidence that plaintiff had suffered indigestion on previous occasions while at work and she says that she took medicine on the day of the accident so that she could go on with her work and she did continue working. In seeking relief from her illness as she did, plaintiff was doing something incidental to her employment and necessary to her health and comfort and, consequently, did not withdraw herself from the course of her employment. Wabash Ry. Co. v. Industrial Commission, 360 Ill. 92, 96; Porter v. Industrial Com. 352 Ill. 392. In the latter case, an employee salesman, while riding a train on business, was injured when luggage fell upon him while he was engaged with a toothpick, removing a seed from his tooth. The injury was held to have arisen out of and in the course of his employment. The Mazursky case, 364 Ill. 445, cited by plaintiff, is not applicable here, because though the employee was injured on his employer's premises, the injury was said not to have arisen out of his employment because he was engaged in doing work on his own car and for his own benefit.

Plaintiff, an employee who was ill, took medicine so she could continue work, the medicine caused convulsions which resulted in her injury, and we hold the injury arose out of and in the course of her employment. Her tort action is precluded by the Workmen's Compensation Act and the court's action in directing the verdict for the defendant was proper. There was no evidence

in the record from which any custom of defendant's administering aid to the public can be inferred, nor any evidence that she paid for the medicine administered to her. The evidence on the other hand is that on prior occasions she had xxxx requested and been given medical attention. In view of these considerations, neither the New Hampshire case nor the unconvincing New York case are applicable.

Plaintiff contends, without merit, that she had ceased working at the time of her injury, was not an employee and, consequently, did not come within the Act. It is true she turned the cage over to another employee and indicated an intention of going home, nevertheless, she admits she took the medicine so that she could continue work, and did resume work after the first dose. We cannot say that by seeking comfort or the aid of her employees, after her sickness grew worse, that she thereby was no longer an employee any more than she would have ceased being an employee had she interrupted her work for any other purpose of personal comfort.

Plaintiff says that had she filed a claim under the Act, defendant would have adopted her theories of this case. In answer, defendants point out that the accident occurred July 30, 1938; defendant filed its answer February 17, 1939; and plaintiff had five months thereafter in which to file her claim under the Act.

Plaintiff further urges that since the allegation, that the accident is compensable under the Act, is an affirmative defense, the burden of proof was on the defendant to prove the allegation by production of facts and that the defendant neither offered nor attempted to introduce any evidence to show that plaintiff's illness and injury were incidental to her employment. Defendant answers, and we agree, that since plaintiff's own testimony produced the facts, defendant was thereby relieved of the burden.

In conclusion, we are of the opinion that the unfortunate accident in this case is subject to the Workmen's Compensation Act, and, accordingly, the instant action is not available to her. The action of the trial court was proper and judgment for defendant is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.

In conclusion, we are of the opinion that the motion
applicant in this case is subject to the terms of a conservation act,
and, accordingly, the instant action is not available to him. The
action of the trial court was proper and judgment for defendant is
affirmed.

CONCURRING JUSTICES.

SMITH, P.J. AND KNOX, J. DISSENT.

42234

317 I.A. 149

Appeal by ABRAHAM H. PATEK,
Receiver-Appellant.

CLARA YOUNG,
Plaintiff-Appellee

v.

FREDERICK A. SMITH, et al.,
Defendant-Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

99

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

June 9, 1939, plaintiff, Clara Young, filed her bill to foreclose a mortgage on premises described in the bill of complaint also known as 1300-10 Flournoy Street in the City of Chicago. On June 10, on her motion, Judge Williams appointed Patek receiver of the premises. He qualified and took possession. The premises were improved by a building about fifty years old, consisting of eighteen flats, stove heated. The building was in a dilapidated condition, as plaintiff's complaint showed, she alleging that its condition was such that it would be condemned and ordered wrecked by the City of Chicago. Subsequent orders by Judges Donald McKinlay and Lupe authorized the receiver to make repairs and directed the issuance of receiver's certificates to secure payment therefor. Plaintiff's mortgage was for the sum of $24,000 on which there is now about $33,000 due and unpaid, and unpaid taxes amount to about $8,600.

Plaintiff's solicitor in her suit was Mr. Grossman. On July 13, 1940, she procured an order of substitution. On the 18th of July she filed her petition praying that the receiver might be removed. In quite general terms she averred the receiver had made misrepresentations to the court, had made repairs without authority and was paying excessive sums for work, labor and material. The receiver answered denying the material averments of the petition.

Appeal by ABRAHAM H. SACKS,
Receiver-Appellant.

CLARA YOUNG,
Plaintiff-Appellee

v.

FRANCISCO A. ZULEW, et al.,
Defendant-Appellant.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

June 9, 1920, plaintiff, Clara Young, filed her bill to foreclose a mortgage on premises described in the bill of complaint also known as 1300-10 Flournoy street in the City of Chicago. On June 10, on her motion, Judge Williams appointed Peter Sacks receiver of the premises. He qualified and took possession. The premises were improved by a building about fifty years old, consisting of eighteen flats, stove heated. The building was in a dilapidated condition, as plaintiff's complaint showed, she alleging that its condition was such that it would be condemned and ordered wrecked by the City of Chicago. Subsequent orders by Judges Donald McNally and Lupe authorized the receiver to make repairs and directed the issuance of receiver's certificates to secure payment therefor. Plaintiff's mortgage was for the sum of $24,000 on which there is now about $23,000 due and unpaid, and unpaid taxes amount to about $8,800.

Plaintiff's solicitor in her suit was Mr. Greenebaum. On July 12, 1940, she procured an order of substitution. On the 18th of July she filed her petition praying that the receiver might be removed. In quite general terms she averred the receiver had made misrepresentations to the court, had made repairs without authority and was paying excessive sums for work, labor and material. The receiver answered denying the material averments of the petition.

The cause was referred to a master by Judge Nelson. The master took the evidence and reported the allegations of the petition had not been proved. He recommended the petition be dismissed. Twenty-nine objections were filed by plaintiff. These were overruled by the master and by order of the chancellor stood as exceptions before him. On May 7, 1941, the chancellor without (so far as the record shows) giving a hearing to the parties, entered an order as follows:

> "That A. H. Patek be and he is hereby censured for his acts and actions as an officer of this Court in this cause; it is further ordered that any and all claims which Patek, formerly receiver herein, may have or claim to have against the receivership property herein, be and the same are hereby held to be invalid and void; further ordered that the final account and report of Patek, Receiver, be and the same is hereby approved but only upon the condition and understanding that all claims which he has or may claim to have, either personally or as receiver herein, in any manner growing out of his receivership in this cause, are hereby denied, waived and disallowed."

Patek has appealed from this order and from a subsequent order of November 17, 1941, denying his petition to set it aside.

The master specifically found that the plaintiff had knowledge of the appointment of Patek as receiver; that "receiver had the building inspected by competent engineers, contractors and architects, obtained estimates for the cost of rehabilitating and placing same in a condition where it could be rented; when said examination was made most doors were gone, plumbing had been ripped out, floors were faulty, the wainscotting was largely missing , much of the plaster was off, the apartments were unpainted, the wiring had been ripped out and the building was almost entirely uninhabitable; that the estimate made by the engineers, contractors and architects for the rehabilitation was so large that Receiver determined to rehabilitate said premises piecemeal in order to keep costs down;

The cause was referred to a master by Judge Nelson. The master took the evidence and reported the allegations of the petition had not been proved. He recommended the petition be dismissed. Twenty-nine objections were filed by plaintiff. These were overruled by the master and by order of the chancellor stood as exceptions before him. On May 7, 1941, the chancellor without (so far as the record shows) giving a hearing to the parties, entered an order as follows:

> "That A. H. Petek be and he is hereby confirmed for his acts and actions as an officer of this Court in this cause; it is further ordered that any and all claims which Petek, firm, or receiver herein, may have or claim to have against the receivership property herein, be and the same are hereby held to be invalid and void; further ordered that the final account and report of Petek, Receiver, be and the same is hereby approved but only upon the condition and understanding that all claims which he has or may claim to have, either personally or as receiver herein, in any manner growing out of his receivership in this cause, are hereby denied, waived and disallowed."

Petek has appealed from this order and from a subsequent order of November 17, 1941, denying his petition to set it aside.

The master specifically found that the plaintiff had knowledge of the appointment of Petek as receiver; that "receiver had the building inspected by competent engineers, contractors and architects, obtained estimates for the cost of rehabilitating and placing same in a condition where it could be rented; when said examination was made most doors were gone, plumbing had been ripped out, floors were faulty, the reinforcing was largely missing, much of the plaster was off, the apartments were unpainted, the wiring had been ripped out and the building was almost entirely uninhabitable; that the estimate made by the engineers, contractors and architects for the rehabilitation was so large that Receiver determined to rehabilitate said premises piecemeal in order to keep costs down;

for that purpose he obtained necessary orders from Court; that on June 30, 1939, he obtained an order to issue a Receiver's Certificate for $2,500.00 which he could discount at ten per cent; that he was unable to discount said certificate and that he advanced his own money for such rehabilitation, and since then has advanced further monies as shown by Receiver's current account; * * * that the minimum amount estimated by engineers, contractors and architects was the sum of $6,500.00, that the amount expended was much less than the lowest estimate; that the Receiver acted in good faith in rehabilitating said building, put it in a rentable condition to preserve whatever equity there might be in said building for the use and benefit of Clara Young, Petitioner. * * * that there is no proof in the record supporting the averments contained in the petition that the reasonable cost of completing all necessary reconditioning of said property would amount to less than $1,800.00, nor is there any proof in the record supporting any of the averments in the Petition that Receiver has misrepresented any fact or facts to the Court or that Receiver was not acting in good faith; * * * that the work done by the Receiver in the preservation and rehabilitation of said premises in making same rentable was necessary and was done pursuant to proper orders of this Court; that all materials reported were actually purchased and paid for and all of the labor hired was essential and was used in the rehabilitation and preservation of said premises; * * * that no evidence was offered that any single or specific item was not necessary or not actually used in the repair and restoration of said premises."

Neither in their brief nor upon oral argument did the plaintiff point out any specific item or items concerning which the reciver had made any misrepresentation, or the expenditures were unwise or unnecessary.

for that purpose be obtained necessary orders from Court; that on June 30, 1929, he obtained an order to issue Receiver's certificate for $2,500.00 which he could discount at ten per cent; that he was unable to discount said certificate and that he advanced his own money for such rehabilitation, and since then has advanced further monies as shown by Receiver's current account; * * * that the minimum amount estimated by engineers, contractors and architects was the sum of $6,500.00, that the amount expended was much less than the lowest estimate; that the Receiver acted in good faith in rehabilitating said building, put it in a rentable condition to preserve whatever equity there might be in said building for the use and benefit of Clara Young, Petitioner. * * * that there is no proof in the record supporting the averments contained in the petition that the reasonable cost of completing all necessary reconditioning of said property would amount to less than $1,800.00, nor is there any proof in the record supporting any of the averments in the Petition that Receiver has misrepresented any fact or facts to the Court or that Receiver was not acting in good faith; * * * that the work done by the Receiver in the preservation and rehabilitation of said premises in making same rentable was necessary and was done pursuant to proper orders of this Court; that all materials reported were actually purchased and paid for and all of the labor hired was essential and was used in the rehabilitation and preservation of said premises; * * * that no evidence was offered that any single or specific item was not necessary or not actually used in the repair and restoration of said premises."

Neither in their brief nor upon oral argument did the plaintiff point out any specific item or items concerning which the receiver had made any misrepresentation, or the expenditures were unwise or unnecessary.

The brief of plaintiff states:

> "It is the theory of Plaintiff that the Lower Court has the inherent right to deal with its own Receiver and in its sound discretion to censor said officer when the facts and conduct of said officer warrant said action."

It will be conceded that the right to censure or remove a receiver depends upon the facts. In the instant case no such facts justifying appear. The petition predicated its demand for his removal upon his alleged wrongdoing, which was denied by him. The master's report exhonorated him from these charges and recommended that he be not removed. The court overruled that recommendation and ordered him removed and also that the consideration of all the master's report be continued. The court should not have overruled the recommendation of the master before considering the facts on which that recommendation was based.

The weight to be given to the report of a master has been often stated in the decisions, which are not uniform. The cases are collected in Phillips v. W. G. N., Inc., 307 Ill. App.1, Wechsler v. Gidwitz, 250 Ill. App. 136, Pasedach v. Auw, 364, Ill. 491, and Litwin v. Litwin, 375 Ill. 96, Mruk v. Mruk, 379 Ill. 394.

The orders appealed from will be reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

The brief of plaintiff states:

> "It is the theory of plaintiff that the lower court has the inherent right to deal with its own officers and in its sound discretion to oust said officers when the facts and conduct of said officers warrant said action."

It will be conceded that the right to oust or remove a ministerial officer depends upon the facts. In the instant case no such facts appear justifying the petition predicated its second for his removal upon his alleged misbehaving, which was denied by him. The master's report exonerated him from these charges and recommended that he be not removed. The court overruled that recommendation and ordered him removed and also that the consideration of all the master's report be continued. The court should not have overruled the recommendation of the master before considering the facts on which that recommendation was based.

The weight to be given to the report of a master has been often stated in the decisions, which are not uniform. The cases are collected in Phillips v. R. R. Co., 207 Ill. App. 1, Bachelor v. Hinkle, 250 Ill. App. 156, Freeberg v. Lee, 264 Ill. 491, and Litwin v. Litwin, 278 Ill. 95, Ryan v. Ryan, 279 Ill. 504.

The orders appealed from will be reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Scott, JJ., concur.

42207

317 I.A. 149

MEYER SAFFRON, Appellant,	APPEAL FROM
vs.	SUPERIOR COURT,
YOUNG MEN'S CHRISTIAN ASSOCIATION OF CHICAGO, a corporation, Appellee.	COOK COUNTY.

MR.JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking damages for injuries said to have been received while a guest in the defendant's hotel because of the negligent operation of one of its elevators in which he was a passenger. Defendant moved to strike the complaint on the ground that it was and has long been duly incorporated under the laws of Illinois as a charitable or eleemosynary institution and hence is not liable for acts of negligence on the part of its employes. The motion to strike was allowed and plaintiff appeals to this court.

Plaintiff first asserts there was no evidence as to the charitable character of defendant and that the court erroneously assumed this to be a fact. To this defendant replies that the record shows plaintiff waived his right to urge this and it has filed a motion to strike this point from plaintiff's brief. It has also filed a supplemental record which conclusively shows that plaintiff's counsel on the trial admitted the charitable character of defendant. He repeatedly stated he waived any procedural question and did not deny that defendant was a charitable institution, "because it has been ruled on by the Supreme court. It would be foolish for me to test it out again." In Lewy v. Standard Elevator Co., 296 Ill. 295, where a similar situation arose, the court said that the attorney for the defendant had stated in open court upon the trial that he would not make a certain claim against the plaintiff; that it was a well settled rule that counsel could not in the court of review take

42507

MYRON BARTECK, Appellant,	APPEAL FROM
vs.	MUNICIPAL COURT,
YOUNG MEN'S CHRISTIAN ASSOCIATION OF CHICAGO, a corporation, Appellee.	COOK COUNTY.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit seeking damages for injuries said to have been received while a guest in the defendant's hotel because of the negligent operation of one of its elevators in which he was a passenger. Defendant moved to strike the complaint on the ground that it was and has long been duly incorporated under the laws of Illinois as a charitable or eleemosynary institution and hence is not liable for acts of negligence on the part of its employes. The motion to strike was allowed and plaintiff appeals to this court.

Plaintiff first asserts there was no evidence as to the charitable character of defendant and that the court improperly assumed this to be a fact. To this defendant replies that the record shows plaintiff waived his right to urge this and it has filed a motion to strike this point from plaintiff's brief. It has also filed a supplemental record which conclusively shows that plaintiff's counsel on the trial admitted the charitable character of defendant. He repeatedly stated he waived any procedural irregularity and did not deny that defendant was a charitable institution, "because it has been ruled on by the Supreme Court. It would be foolish for me to test it out again." In Lowy v. Standard Drawing Co., 296 Ill. 295, where a similar situation arose, the court said that the attorney for the defendant had stated in open court upon the trial that he would not make a certain claim against the plaintiff; that it was a well settled rule that counsel could not in the court of review take

a position entirely inconsistent with his position on the trial. We hold that plaintiff waived any question as to the character of defendant.

The motion of defendant to strike this point from plaintiff's brief was reserved to the hearing. As what we have just said makes this motion unnecessary, it will be so ordered.

Moreover the charitable character of the defendant is judicially known to this court. In an opinion in People v. Y. M. C. A., 365 Ill. 118, the character of the hotel building in which the alleged injuries to plaintiff were received was fully examined and after an extensive survey the court held that in operating this hotel the defendant was engaged in a charitable function. Courts will take judicial notice of matters that are in the general knowledge and which are an outstanding contemporary fact. Atchison T. & S. F. Ry. Co. v. U. S., 284 U.S. 248, and Straus v. Chicago T. & T. Co. 273 Ill. App. 63.

A large number of cases support the proposition that, whatever the law may be in other states, in Illinois a charitable institution is not liable for personal injuries caused by the negligence of its servants pr agents, and this is true although the injured party paid for its services. In People v. Y. M. C. A., above cited, the court said that the institution did not lose its charitable character by reason of the fact that the recipients of its benefits were required to pay for them, as no profit is made by the institution and the amounts so received are applied in furthering its charitable purposes. To the samebeffect was the decision in Parks v. Northwestern University, 218 Ill. 381. In Hogan v. Chicago Lying-In Hospital, 247 Ill. App. 331, (affirmed in 335 Ill. 42) our opinion cites a large number of cases and affirmed the trial court in sustaining a demurrer to plaintiff's complaint seeking to recover damages sustained

a position entirely inconsistent with his position on the trial. We hold that plaintiff waived any question as to the character of defendant.

The motion of defendant to strike this point from plaintiff's brief was reserved to the hearing. In what we have just said this motion unnecessary, it will be so ordered.

Moreover the charitable character of the defendant is judicially known to this court. In an opinion in People v. Y. M. C. A., 308 Ill. 118, the character of the hotel building in which the alleged injuries to plaintiff were received was fully considered and after an extensive survey the court held that in operating this hotel the defendant was engaged in a charitable function. Courts will take judicial notice of matters that are in the general knowledge and which are an outstanding contemporary fact. Atkinson T. & S. F. R. R. Co. v. U. S., 294 U.S. 648, and Ottman v. Chicago T. & T. Co., 213 Ill. App. 62.

A large number of cases support the proposition that, wherever the law may be in other states, in Illinois a charitable institution is not liable for personal injuries caused by the negligence of its servants or agents, and this is true although the injured party paid for its services. In People v. Y. M. C. A., above cited, the court said that the institution did not lose its charitable character by reason of the fact that the recipients of its benefits were required to pay for them, as no profit is made by the institution and the amounts so received are applied in furthering its charitable purposes. To the same effect was the decision in People v. Northwestern University, 218 Ill. 391. In Bauer v. Chicago Lying-in Hospital, 247 Ill. App. 331, (affirmed in 326 Ill. 42) our criticism cites a large number of cases and affirmed the trial court in sustaining a demurrer to plaintiff's complaint seeking to recover damages sustained

by reason of the negligence of defendant , a charitable hospital, although he had paid an adequate fee for services.

Counsel for plaintiff attempts to distinguish the cases cited by defendant but is not convincing in this respect. He also asserts that since the opinion in the Hogan case the weight of authority is against the conclusion there announced. We do not agree with this, and in the recent case of People v. Y. M. C. A., above cited, the immunity of defendant against actions in tort is again recognized. A still more recent case is Myers v. Y. M. C. A. of Quincy, 316 Ill. App. 177, where an extended opinion supports in every respect the position above stated.

The action of the trial court in striking the complaint was in accordance with the law of this state, and it is affirmed.

AFFIRMED.

O'Connor, J., concurs.
Matchett, P. J., took no part in this case.

by reason of the negligence of defendant, a chargeable negligence, although he had paid an adequate fee for protection.

Counsel for plaintiff attempts to distinguish the cases cited by defendant but is not convincing in this respect. He also asserts that since the opinion in the Ferris case the weight of authority is against the conclusion there announced. We do not agree with this, and in the recent case of Ziegle v. [illegible], above cited, the immunity of defendant against actions in tort is again reconsidered. A still more recent case is Ayers v. [illegible] Co., 219 Ill. App. 177, where an extended opinion supports in every respect the position above stated.

The action of the trial court in sustaining the demurrer was in accordance with the law of this state, and it is affirmed.

AFFIRMED.

O'Connor, J., concurs.
Matchett, P. J., took no part in this case.

42209

31 I.A. 150

VITO ADDANTE, Appellant, vs. VINCENZO POMPILIO, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order quashing a writ of capias ad satisfaciendum.

Plaintiff brought suit charging defendant with the conversion of money and had judgment for $3,003, which on appeal was affirmed by this court. (303 Ill. App. 172.)

The writ of capias was issued and defendant was imprisoned for a short time. A motion was made to quash the writ, which was sustained.

Defendant in his petition and motion to quash alleged that the writ was invalid for at least two reasons. Section 5, ch. 77, Ill. Rev. Stats. provides that no capias shall issue against the defendant "except when the defendant shall refuse to deliver up his estate for the benefit of his creditors." The record shows that the capias was issued without any showing to this effect, but this is not necessary. Pappas v. Reabus, 299 Ill. App. 499, Brandtjen & Kluge, Inc., v. Forgue, 299 Ill. App. 585.

The second point made is that under the decision in Ingalls v. Raklios, 373 Ill. 404, a capias shall not issue unless the judgment itself finds that malice was the gist of the action upon which judgment was entered. The judgment in the present case does not contain such a finding. For this reason the court properly quashed the writ. Peiffer v. French, 306 Ill. App. 326.

The order of the Circuit court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

VITO ADDANTE, Appellant,	
vs.	APPEAL FROM
	CIRCUIT COURT,
VINCENZO PORPILIO, Appellee.	COOK COUNTY.

MR. JUSTICE MOSURLY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order quashing a writ of capias ad satisfaciendum.

Plaintiff brought suit charging defendant with the conversion of money and had judgment for $3,003, which on appeal was affirmed by this court. (303 Ill. App. 172.)

The writ of capias was issued and defendant was imprisoned for a short time. A motion was made to quash the writ, which was sustained.

Defendant in his petition and motion to quash alleged that the writ was invalid for at least two reasons. Section 3, ch. 77, Ill. Rev. Stats. provides that no capias shall issue against the defendant "except when the defendant shall refuse to deliver up his estate for the benefit of his creditors." The record shows that the capias was issued without any showing to this effect, but this is not necessary. Pappas v. Bandus, 299 Ill. App. 492, Brandtjen & Kluge, Inc., v. Forrow, 299 Ill. App. 388.

The second point made is that under the decision in Ingalls v. Ralston, 373 Ill. 404, a capias shall not issue unless the judgment itself finds that malice was the gist of the action upon which judgment was entered. The judgment in the present case does not contain such a finding. For this reason the court properly quashed the writ. Peltier v. Trumbo, 308 Ill. App. 386.

The order of the Circuit court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

42228

317 I.A. 150[2]

THE WASHINGTON BOULEVARD HOSPITAL, Appellee, vs. THEODORE LEVIN, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging a written guaranty by the defendant of payment of the hospital bill of Margaret McCormick, his client, and upon trial by the court had judgment for $1743.30, from which defendant appeals.

January 13, 1938 Miss. McCormick was injured in an automobile accident and taken to plaintiff's hospital and cared for there; defendant, an attorney, was retained to represent her in her suit for damages for injuries caused by the accident.

As the bill for Miss. McCormick's hospitalization kept rising, plaintiff's secretary and treasurer, Clarence T. Johnson, had a number of talks with defendant about the payment to plaintiff for these services. In May 1938 Johnson told defendant that the hospital could not "hold the bag any longer" unless the plaintiff had assurance that the bill would be paid. Defendant told him there was plenty of liability to take care of everybody and that he would send a letter that plaintiff's bill would be taken care of in the event of a settlement of his client's claim.

The letter upon which this suit is based was received during the early part of June, 1938. The letterhead has the name of defendant with his office address in Chicago and is directed to the plaintiff. It reads as follows:

THE PUBLIC NOTARY AND LAWYER HOSPITAL,
Appellee,

vs.

THEODORE LEVIN,
Appellant.

APPEAL FROM
Circuit Court,
Cook County.

MR. JUSTICE MCGURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging a written guaranty by the defendant of payment of the hospital bill of Margaret McCormick, his client, and upon trial by the court had judgment for $1743.50, from which defendant appeals.

January 13, 1938 Mrs. McCormick was injured in an automobile accident and taken to plaintiff's hospital and cared for there; defendant, an attorney, was retained to represent her in her suit for damages for injuries caused by the accident.

As the bill for Mrs. McCormick's hospitalization kept mounting, plaintiff's secretary and treasurer, Clarence L. Johnson, had a number of talks with defendant about the payment to plaintiff for these services. In May 1938 Johnson told defendant that the hospital could not "hold the bag any longer" unless the plaintiff had assurance that the bill would be paid. Defendant told his client was plenty of liability to take care of everybody and that he would send a letter that plaintiff's bill would be taken care of in the event of a settlement of his client's claim.

The letter upon which this suit is based was received during the early part of June, 1938. The letterhead has the name of defendant with his office address in Chicago and is dictated to the plaintiff. It reads as follows:

"Gentlemen:

This is to confirm my telephone conversation with you today relative to Miss McCormick, a patient in your hospital.

You are hereby assured that all hospital bills will be paid out of the proceeds of whatever may be received as a result of the prosecution of her claim for injuries sustained on January 13, 1938.

In view of the serious injuries sustained and the unquestionable liability of the defendant and its ability to pay, there doesn't appear to be any question but what there will be amply sufficient to pay for all of the hospital and other charges.

Yours very truly,
Theodore Levin (signed)

Plaintiff then permitted Miss McCormick to remain in the hospital until she was discharged on November 17, 1938. At this time plaintiff's bill was $1743.30, and had not been paid.

Defendant subsequently settled his client's case, receiving $6500, which was paid to him. He testified that he gave Miss McCormick $2500 "at her insistence." Defendant retained for his services $2700. At her request $500 was paid "to some man" who defendant said had befriended her, and $459.23 was paid to her doctor. Nothing was paid to the plaintiff hospital.

Defendant argues that the letter does not constitute a guaranty; that it is merely an assurance of the intention of Miss McCormick to pay her hospital bill. In construing contracts of guaranty the same rules are applied as in the case of other contracts to determine and give effect to the intention of the parties. Reasonable interpretation of the language employed should be given in the light of the attending circumstances and the purposes for which the guaranty was made. 28 C. J., page 930. In Taussig v. Reid, 145 Ill. 488, 497, the court said that construing such instruments should be as favorable to the creditor "notwithstanding the guarantor is, in a sense, to be regarded as a surety," and that the words are to be taken as strongly against the party giving them as the sense

"Gentlemen:

This is to confirm my telephone conversation with you today relative to mine collection, a patient in your hospital.

You are hereby assured that all hospital bills will be paid out of the proceeds of whatever may be received as a result of the prosecution of his claim for injuries sustained on January 15, 1928.

In view of the serious injuries sustained and the unquestionable liability of the defendant and its ability to pay, there doesn't appear to be any question but what there will be amply sufficient to pay for all of the hospital and other charges.

Yours very truly,
Theodore Levin (signed)

Plaintiff then permitted Miss McCormick to remain in the hospital until she was discharged on November 17, 1928. At this time plaintiff's bill was $1743.30, and had not been paid.

Defendant subsequently settled his client's case, receiving $8500, which was paid to him. He testified that he gave Miss McCormick $3500 "at her insistence." Defendant retained for his services $2700. At her request $300 was paid "to some man" who defendant said had befriended her, and $439.53 was paid to her doctor. Nothing was paid to the plaintiff hospital.

Defendant argues that the letter does not constitute a guaranty; that it is merely an assurance of the intention of Miss McCormick to pay her hospital bill. In construing contracts of guaranty the same rules are applied as in the case of other contracts to determine and give effect to the intention of the parties. Reasonable interpretation of the language employed should be given in the light of the attending circumstances and the purposes for which the guaranty was made. 38 C.J., page 830. In Tuesday v. Hold, 145 Ill. 486, 497, the court said that construing such instruments should be as favorable to the creditor "notwithstanding the guarantor is, in a sense, to be regarded as a surety," and that the words are to be taken as strongly against the party giving them as the sense

of them will admit. In Castle v. Powell, 261 Ill. App. 132, 141, it was said that "Courts will seek to discover and give effect to the intention of the parties, and contracts of guaranty will be construed in the same manner other contracts (Whalen v. Stephens, 193 Ill. 121), and as favorably to the creditor as any other written contract. (Swisher v. Deering, 204 Ill. 203; Taussig v. Reid, 145 Ill. 488.)" The decision in Commonwealth T. & S. Bk. v. Hart, 268 Ill. App. 322, is not in conflict with these cases. There it was held that a guarantor is a favorite of the law and has a right to stand upon the strict terms of his obligation "when such terms are ascertained." The cases first above cited state the rule for ascertaining the terms of an obligation.

The decisive part of the instant letter is: "You are hereby assured that all hospital bills will be paid out of the proceeds of whatever may be received as a result of the prosecution of her claim for injuries sustained on January 13, 1938." By these words the defendant undertook to see that plaintiff's hospital bill would be paid out of the proceeds of whatever may be received as a result of her claim for damages. Language could not be clearer. Plaintiff does not contend that this was a guaranty by the defendant of the payment of the hospital bill in any event. Nor can it be said to be a general guaranty of payment by the defendant. If nothing had been realized out of the prosecution of her claim there would have been no liability on defendant's part, but it is definitely an undertaking to pay plaintiff's bill out of whatever may be realized from her claim.

There is no dispute as to the reasonableness of the charges for plaintiff's services, and defendant himself testified that he received $6500 from his settlement of Miss McCormick's claim. He then had in his possession funds more than sufficient to pay plaintiff's bill, and if, as he says, he turned over part of this to his client,

of them will admit. In Gastle v. Powell, 281 Ill. 400, 132, 141, it was said that "courts will seek to discover and give effect to the intention of the parties, and contracts of guaranty will be construed in the same manner other contracts (Wagner v. Atkinson, 192 Ill. 183), and as favorably to the creditor as any other written contract. (Swisher v. Dearing, 204 Ill. 202; Tenacre v. Reid, 148 Ill. 492.)" The decision in Commonwealth L. & L. Co. v. Hart, 288 Ill. App. 324, is not in conflict with these cases. There it was held that a guarantor is a favorite of the law and has a right to stand upon the strict terms of his obligation "when such terms are ascertained." The cases first above cited state the rule for ascertaining the terms of an obligation.

The decisive part of the instant letter is: "You are hereby assured that all hospital bills will be paid out of the proceeds of whatever may be received as a result of the prosecution of her claim for injuries sustained on January 13, 1932." By these words the defendant undertook to see that plaintiff's hospital bill would be paid out of the proceeds of whatever may be received as a result of her claim for damages. Language could not be clearer. Plaintiff does not contend that this was a guaranty by the defendant of the payment of the hospital bill in any event. Nor can it be said to be a general guaranty of payment by the defendant. If nothing had been realized out of the prosecution of her claim there would have been no liability on defendant's part, but it is definitely an undertaking to pay plaintiff's bill out of whatever may be realized from her claim.

There is no dispute as to the reasonableness of the charges for plaintiff's services, and defendant did not dispute that he received $8500 from his settlement of Miss Cortright's claim. He then had in his possession funds more than sufficient to pay plaintiff's bill, and if, as he says, he turned over part of them to his client,

yet he kept for himself $2700, much more than sufficient to pay the plaintiff. Common justice and his written obligation required him to pay plaintiff's bill out of the amount received in the settlement of his client's claim.

Defendant says the court committed error in refusing to permit him to show an alleged custom and usage of attorneys in similar cases relating to letters sent to hospitals. The record shows that no offer was made as to the nature of such custom and usage if there was any such. The rule is that where an offer is made to produce evidence and objection is interposed, the offer must state specifically what it is proposed to show so that the court may rule upon its materiality and relevancy. Hair Co. v. Manly, 102 Ill. App. 570, and Maxwell v. Habel, 92 Ill. App. 510, and other cases.

Defendant argues that the judgment is contrary to the manifest weight of the evidence and cites many cases holding that under such circumstances a court of review will reverse. There is no doubt but that this is the rule. The evidence shows clearly that the letter was written to induce plaintiff to permit defendant's client to remain in its hospital and that following the letter she did so remain for many months thereafter. The evidence in this respect is uncontradicted and this is a good consideration for the defendant's undertaking. The judgment is sufficiently proved by the preponderance of the evidence, and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

yet he kept for himself $6700, much more than sufficient to pay the plaintiff. Counsel justifies and his written obligation required him to pay plaintiff's bill out of the amount received in the settlement of his client's claim.

Defendant says the court committed error in refusing to permit him to show an a legal custom and usage of attorneys in similar cases relating to letters sent to hospitals. The record shows that no offer was made as to the nature of such custom and usage if there was any such. The rule is that where an offer is made to produce evidence and objection is not upheld, the offer must state specifically what it is proposed to show so that the court may rule upon its materiality and relevancy. Hair Co. v. Hardy, 102 Ill. App. 670, and Harrell v. Hebel, 92 Ill. App. 610, and other cases.

Defendant argues that the judgment is contrary to the manifest weight of the evidence and cites many cases holding that under such circumstances a court of review will reverse. There is no doubt but that this is the rule. The evidence shows clearly that the letter was written to induce plaintiff to permit defendant's client to remain in its hospital and that following the letter she did so remain for many months thereafter. The evidence in this respect is uncontradicted and this is a good consideration for the defendant's undertaking. The judgment is sufficiently proved by the preponderance of the evidence, and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

42266

317 I.A. 151

ELIZABETH FRIESE and WALTER E. FRIESE, Appellants vs. GEORGE R. FRIESE, et al., Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This cause has twice been before the Supreme court. The first opinion is in 373 Ill. 216, where the decree of the Superior court which directed the trustee to distribute the corpus of the trust, which included real estate, was affirmed. The cause was redocketed and the partition feature of the litigation proceeded, as narrated in the opinion in 379 Ill. 269. Commissioners were appointed who found that the premises were indivisible and their value was fixed at $9500; a decree was entered which directed the master to sell the real estate at public vendue to the highest bidder, provided the bid shall be equal to at least two-thirds of the valuation fixed by the commissioners, as required by section 27 of the Partition act. (ch. 106, Ill. Rev. Stats.)

Nancy Kelley was the holder of a mortgage indebtedness of $3000, and default being made in payment, she started a foreclosure suit. That action was consolidated with the partition suit. The property was encumbered with taxes for the years 1934-1940 inclusive, or approximately $2000. The property was sold to Nancy Kelley on her bid of $6400, which was more than the required two-thirds of the appraised value and sufficient to account for the first mortgage encumbrance and taxes due on the property. A report of the sale was duly made by the master and a copy sent to each of the parties in the proceedings and a decree was entered approving

42266

ELIZAB TH FAI S and VOLI E. FAI S, Appellants	APPEAL FROM SUP I R COURT, COOK COUNTY.
vs.	
GEORGE R. FAI S, et al., Appellees.	

MR. JUSTICE MORRIX DELIVERED THE OPINION OF THE COURT.

This cause has twice been before the supreme court. The first opinion is in 278 Ill. 216, where the decree of the superior court which directed the trustee to distribute the corpus of the trust, which included real estate, was affirmed. The cause was redocketed and the partition feature of the litigation proceeded, as narrated in the opinion in 279 Ill. 280. Commissioners were appointed who found that the premises were indivisible and their value was fixed at $8000; a decree was entered which directed the master to sell the real estate at public venue to the highest bidder, provided the bid shall be equal to at least two-thirds of the valuation fixed by the commission, as required by section 27 of the Partition act. (Ch. 106, Ill. Rev. Stats.)

Nancy Kelley was the holder of a mortgage indebtedness of $3000, and default being made in payment, she started a foreclosure suit. That action was consolidated with the partition suit. The property was encumbered with taxes for the years 1934-1940 inclusive, or approximately $2000. The property was sold to Nancy Kelley on her bid of $8400, which was more than the required two-thirds of the appraised value and sufficient to account for the first mortgage encumbrance and taxes due on the property. A report of the sale was duly made by the master and a copy sent to each of the parties in the proceedings and a decree was entered approving

the sale, reciting among other things that the sale was fairly made and empowering the master to pay all the outstanding delinquent taxes out of the proceeds of the sale.

Subsequently the plaintiffs filed a petition asking that this decree be vacated on the ground that no notice was given plaintiffs of the presentation of the decree, that the property involved was sold for a considerable sum less than its true value, and that the decree provided that all of the delinquent taxes should be paid out of the purchase price.

Separate answers were filed by Nancy Kelley and others, The trial court denied the prayer of the petition and plaintiffs appealed to the Supreme court alleging there was a freehold involved. That court held that plaintiffs' objection was directed solely to that part of the decree which orders the master to pay the taxes from the proceeds of the sale; that this issue does not involve a freehold and that it made no difference to the title which Nancy Kelley would acquire by a master's deed whether the issuable matter relating to the taxes was granted or denied, for in either event she would retain the title. The cause was transferred to this court. (379 Ill. 269)

The briefs which were filed in the Supreme court are the only briefs in this court, and nowhere in the briefs of the appealing plaintiffs do we find any point made as to the provisions of the decree with reference to the delinquent taxes. Complaint is made of the action of the chancellor in refusing to vacate its decree confirming the master's report when it was informed that no master's report of the sale was on file. The opinion of the Supreme court above referred to disposes of this point adversely to the claim of plaintiffs. The only reference in the brief to that part of the decree ordering the master to pay the delinquent taxes is merely a recital of the fact, with the statement that if the sale is

the sale, positing among other things that the sale was fairly made and empowering the master to pay all the outstanding delinquent taxes out of the proceeds of the sale.

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Separate answers were filed by Nancy Kelley and others. The trial court denied the prayer of the petition and plaintiffs appealed to the supreme court alleging there was a freehold involved. That court held that plaintiffs' objection was directed solely to that part of the decree which orders the master to pay the taxes from the proceeds of the sale; that this issue does not involve a freehold and that it made no difference to the title which Nancy Kelley would acquire by a master's deed whether the taxable matter relating to the taxes was granted or denied, for in either event she would retain the title. The cause was transferred to this court. (279 Ill. 254)

The briefs which were filed in the supreme court are the only briefs in this court, and nowhere in the briefs of the appealing plaintiffs do we find any point made as to the provisions of the decree with reference to the delinquent taxes. Complaint is made of the action of the chancellor in refusing to vacate the decree confirming the master's report when it was informed that no master's report of the sale was on file. The opinion of the supreme court above referred to discusses of this point adversely to the claim of plaintiffs. The only reference in the brief to that part of the decree ordering the master to pay the delinquent taxes is merely a recital of the fact, with the statement that if the sale is

permitted to stand the proceeds will be sufficient only to pay the encumbrances and costs of the suit.

An answer to plaintiffs' petition was filed by Nancy Kelley in which she asserts that all the parties were present at the sale; that she paid $6400 cash, which was in accordance with the provision that the bid was to be at least two-thirds of the valuation; that all of the parties had full knowledge of the mortgage indebtedness of $3000 and the delinquent taxes; that a copy of the master's report of sale was sent to all parties and no exceptions were filed to the report and no counter-affidavits were filed denying the averments in Nancy Kelley's answer.

The Supreme court found there were no facts supporting the claim that the property was sold for a sum less than its true value. It sold for a sum sufficient to pay the encumbrances, including the delinquent taxes, which must be paid to give the buyer a clear title. It was proper and reasonable for the chancellor to order them to be paid out of the sum received at the sale.

The decree confirming the master's report of sale was entered October 22, 1940, and it was not until January 6, 1941 that plaintiffs filed their petition to set aside the decree.

In the answer of defendant George R. Friese to the petition to set aside the decree confirming the sale he says he is a beneficiary under the trust in which the property involved was held; that he verily believes that the setting aside of the sale would entail further delay and expense in this proceeding, to the damage of the beneficiaries under the trust, including the plaintiffs. He asked that plaintiffs' petition be dismissed.

The trial court so ordered and, for the reasons indicated the order is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

permitted to stand the proceeds will be traced only to pay the encumbrances and costs of the suit.

An answer to plaintiffs' petition was filed by Nancy Kelley in which she asserts that all the parties were present at the sale; that she paid $6400 cash, which was in accordance with the provision that the bid was to be at least two-thirds of the valuation; that all of the parties had full knowledge of the mortgage indebtedness of $3000 and the delinquent taxes; that a copy of the master's report of sale was sent to all parties and no exceptions were filed to the report and no counter-affidavits were filed denying the averments in Nancy Kelley's answer.

The Supreme court found there were no facts supporting the claim that the property was sold for a sum less than its true value. It sold for a sum sufficient to pay the encumbrances, including the delinquent taxes, which must be paid to give the buyer a clear title. It was proper and reasonable for the chancellor to order them to be paid out of the sum received at the sale.

The decree confirming the master's report of sale was entered October 28, 1940, and it was not until January 5, 1941 that plaintiffs filed their petition to set aside the decree.

In the answer of defendant George R. Friese to the petition to set aside the decree confirming the sale he says he is a beneficiary under the trust in which the property involved was held; that he verily believes that the setting aside of the sale would entail further delay and expense in this proceeding, to the damage of the beneficiaries under the trust, including the plaintiffs. He asked that plaintiffs' petition be dismissed.

The trial court so ordered and, for the reasons indicated the order is affirmed.

AFFIRMED.

Hatchett, J. d., and O'Connor, J., concur.

42212

GEORGE L. W. MOORE and CLARA MOORE,
Appellees,

v.

BRIDGET H. SULLIVAN, Administratrix de bonis non of Estate of JAMES W. MOORE, Deceased,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR.JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

George L. W. Moore and Clara Moore, his wife, filed their claim December 1st, 1938, in the Probate court of Cook county, for $3,305, against the estate of James W. Moore,deceased. There was a hearing and the claim was disallowed; an appeal was taken to the Circuit court of Cook county, where there was a trial and the claim allowed for $2,640. An appeal was taken to this court where the judgment of the Circuit court was reversed and the cause remanded, In re Estate of Moore, 310 Ill. App. 365. The case was retried in part; the evidence which was introduced on the first hearing in the Circuit court was offered in evidence on the second trial and some additional evidence was also introduced. The trial judge entered judgment for $2,640 in claimants' favor and the administratrix appeals.

The facts are stated in our former opinion and will not be repeated here. We there said that where a claim for board and nursing was not made as in the instant case, until several years after the claim should have been paid, there was a presumption that the claim had been paid. And we said: "Apparently this was not in the mind of the parties upon the trial and there is evidence available which was not presented." We reversed the judgment and remanded the cause so that the parties might introduce any available

4321S

GEORGE L. W. MOORE and CLARE MOORE, Appellees,	
v.	APPEAL FROM
BRIDGET K. SULLIVAN, Administratrix de bonis non of Estate of James W. MOORE, Deceased, Appellant.	CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

George L. W. Moore and Clare Moore, his wife, filed their claim December 1st, 1898, in the Probate court of Cook county, for $3,305, against the estate of James W. Moore, deceased. There was a hearing and the claim was disallowed; an appeal was taken to the Circuit court of Cook county, where there was a trial and the claim allowed for $2,640. An appeal was taken to this court where the judgment of the Circuit court was reversed and the cause remanded, In re Estate of Moore, 210 Ill. App. 588. The case was retried in part; the evidence which was introduced on the first hearing in the Circuit court was offered in evidence on the second trial and some additional evidence was also introduced. The trial judge entered judgment for $2,640 in claimants' favor and the administratrix appeals.

The facts are stated in our former opinion and will not be repeated here. We there said that where a claim for board and nursing was not made as in the instant case, until several years after the claim should have been paid, there was a presumption that the claim had been paid. And we said: "Apparently this was not in the mind of the parties upon the trial and there is evidence available which was not presented." We reversed the judgment and remanded the cause so that the parties might introduce any available

evidence as to whether the claim had been paid. For this purpose claimants called their two children, George L. W. Moore, Jr., and Mrs. Clara Moore Wilson, who gave testimony to the effect that in the summer of 1932 they heard their father, the claimant, speak to James W. Moore, requesting payment but that the latter said his money was tied up or that he was buying bonds so he was not able to pay at the time. Two other witnesses, called by claimants, testified as to the reasonable value of the services rendered by claimants to James W. Moore. No evidence on this point was offered by defendant.

Defendant offered evidence tending to show that the deceased had ample means at all times to pay his bills as he went along; that he owed no debts but apparently always paid his bills promptly; while on the other hand, claimant George L. W. Moore, who owned an equity in an eight-apartment building, was about to lose the building through foreclosure proceedings begun in 1933 and in lieu of the appointment of a receiver, was authorized to collect the rents; that he did hot pay $45 a month for an extra apartment after James W. Moore went to live with claimants, as the evidence of claimants tended to show.

Counsel for defendant contends that the finding and judgment are against the manifest weight of the evidence and the evidence is discussed,authorities cited, analyzed and applied. We have considered the evidence and the argument made and while we feel there is considerable merit in defendant's contention, yet we are of opinion that we would not be warranted in disturbing the finding and judgment on the ground that they are against the manifest weight of the evidence, especially when we consider the fact that the case has been tried before two judges of the Circuit court and each found in favor of the claimants, and also in view of our former

evidence as to whether the claim had been paid. For this purpose claimants called their two children, George E. Moore, Jr., and Mrs. Clare Moore Wilson, who gave testimony to the effect that in the summer of 1952 they heard their father, the claimant, speak to James W. Moore, requesting payment but that the latter said his money was tied up or that he was buying bonds so he was not able to pay at the time. Two other witnesses, called by claimants, testified as to the reasonable value of the services rendered by claimants to James W. Moore. No evidence on this point was offered by defendant.

Defendant offered evidence tending to show that the deceased had ample means at all times to pay his bills as he went along; that he owed no debts but apparently always paid his bills promptly; while on the other hand, claimant George E. Moore, who owned an equity in an eight-apartment building, was about to lose the building through foreclosure proceedings begun in 1952 and in lieu of the appointment of a receiver, was authorized to collect the rents; that he did not pay $45 a month for an extra apartment at r James W. Moore went to live with claimants, as the evidence of claimants tended to show.

Counsel for defendant contends that the finding and judgment are against the manifest weight of the evidence and the evidence is discussed, authorities cited, analyzed and applied. We have considered the evidence and the argument made and while we feel there is considerable merit in defendant's contention, yet we are of opinion that we would not be warranted in disturbing the finding and judgment on the ground that they are against the manifest weight of the evidence, especially when we consider the fact that the case has been tried before two judges of the Circuit court and each found in favor of the claimants, and also in view of our former

opinion.

Complaint is also made that the court erred in refusing to consider the history of the deceased's bank account for a period of time prior to the time he went to live with claimants and that the court also erred in holding as i material the renting of a safety deposit box by the deceased. We think there was no error in either of these rulings. The court admitted in evidence the record of the deceased's bank account from the time he went to live with claimants and we think the status of his account, prior to that time, in view of all the evidence in the case, was of no probative value. We are also of opinion that the renting of the safety deposit box by the deceased would throw no light on the matter in controversy.

For the reasons stated in this and our former opinion, the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

opinion.

Complaint is also made that the court erred in refusing to consider the history of the decedent's bank account for a period of time prior to the time he went to live with claimants and that the court also erred in holding as a material the finding of a safety deposit box by the deceased. We think there was no error in either of these rulings. The court admitted in evidence the record of the deceased's bank account from the time he went to live with claimants and we think the status of his account, prior to that time, in view of all the evidence in the case, was of no probative value. We are also of opinion that the finding of the safety deposit box by the deceased would throw no light on the matter in controversy.

For the reasons stated in this and our former opinion, the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and Scanlan, J., concur.

42230

THOMAS D. NASH, County Treasurer and Ex Officio County Collector of Cook County, Illinois, and Ex Officio Receiver of Rents,
Appellee,

v.

PARK CASTLES APARTMENT BUILDING CORPORATION, a Corporation,
Appellee,

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 15, 1941, the Metropolitan Life Insurance Company, a corporation, sought leave to file its verified petition and to intervene in a tax receivership suit brought by the County Treasurer and Ex Officio County Collector, June 27, 1934. Objection was made by the plaintiff who had been appointed receiver of a 66 - apartment cooperative building, in Chicago, belonging to defendant, Park Castles Apartment Building Corporation. Objection was also made by the building corporation. Leave to intervene was denied and the insurance company appeals.

The record discloses that July 10, 1933, the County Collector filed his complaint in the County court of Cook county praying that he be appointed receiver of the apartment building to collect the rents and apply them to unpaid taxes levied against the property. A few days thereafter, he was appointed and proceeded to discharge his duties. The proceeding was brought under the Skarda act passed by the Legislature in 1933. (Laws of 1933, p. 873.) A number of similar receiverships were brought, one of which was taken to the Supreme court where it was held that County courts did not have

42250

THOMAS D. HAND, County Treasurer and ex officio County Collector of Cook County, Illinois, and ex officio Receiver of Rents,

Appellee,

v.

PARK CASTLE APARTMENT BUILDING CORPORATION, a Corporation,

Appellee,

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Appellant.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

November 15, 1941, the metropolitan life insurance Company, a corporation, sought leave to file its verified petition and to intervene in a tax receivership suit brought by the County Treasurer and ex officio County Collector, June 27, 1934. Objection was made by the plaintiff who had been appointed receiver of a 85 - apartment cooperative building, in Chicago, belonging to defendant, Park Castles Apartment Building Corporation. Objection was also made by the building corporation. Leave to intervene was denied and the insurance company appeals.

The record discloses that July 10, 1933, the County Collector filed his complaint in the County court of Cook county praying that he be appointed receiver of the apartment building to collect the rents and apply them to unpaid taxes levied against the property. A few days thereafter, he was appointed and proceeded to discharge his duties. The proceeding was brought under the Sheriffs act passed by the Legislature in 1933. (Laws of 1933, p. 873.) A number of similar receiverships were brought, one of which was taken to the supreme court where it was held that County courts did not have

jurisdiction to appoint receivers because they were not specifically mentioned in the act, but that jurisdiction was in courts of chancery, McDonough v. Gage, 357 Ill. 466. The opinion in that case was filed June 20, 1934, and 7 days thereafter, a number of receivership cases which were pending in the County court, including the one in question, were transferred to the Circuit court of Cook county. The County Collector brought a suit in that court where he was appointed tax receiver of the 66-apartment building, and as such receiver, commenced the discharge of his duties. That suit is the one in which the insurance company sought to intervene.

After the decision by our Supreme court in the McDonough case, the Legislature in 1935 amended the Skarda act, or passed a new act in lieu thereof, which authorized County courts to appoint tax receivers. (Laws of 1935, p. 1166.) Following the new law, the County Collector, December 3, 1935, filed his petition in the County court praying that he be appointed receiver of the apartment building and the County court entered an order which, among other things, found that the parties had entered into a stipulation that the County court have jurisdiction of the entire subject matter from 1933, and that the Circuit court proceedings be transferred to the County court. The insurance company was not a party to this stipulation. The County court refused to appoint the County Collector in that proceeding but entered an order which, on appeal to this court, was reversed in part, affirmed in part, and remanded with directions. Toman v. Park Castles Apt. Bldg. Corp. 303 Ill. App. 205. A further appeal was taken to the Supreme court where the judgment of the Appellate court was reversed, and the order of the County court reversed, in part, and remanded, with directions, 375 Ill. 293. September 27, 1934, the County Collector, as receiver, filed his final account in the County court, which showed he had a balance of $11,807.36 in his

jurisdiction to appoint receivers because they were not specifically mentioned in the act, but that jurisdiction was in courts of chancery, McCormick v. Fame, 387 Ill. 465. The opinion in that case was filed June 20, 1934, and 7 days thereafter, a number of receivership cases which were pending in the County court, including the one in question, were transferred to the Circuit court of Cook county. The County Collector brought a suit in that court where he was appointed tax receiver of the 66-apartment building, and as such receiver, commenced the discharge of his duties. That suit is the one in which the insurance company sought to intervene.

After the decision by our supreme court in the McCormick case, the legislature in 1935 amended the Sheridan act, or passed a new act in lieu thereof, which authorized County courts to appoint tax receivers. (Laws of 1935, p. 1165.) Following the new law, the County Collector, December 3, 1935, filed his petition in the County court praying that he be appointed receiver of the apartment building and the County court entered an order which, among other things, found that the parties had entered into a stipulation that the County court have jurisdiction of the entire subject matter from 1935, and that the Circuit court proceedings be transferred to the County court. The insurance company was not a party to this stipulation. The County court returned to appoint the County Collector in that proceeding but entered an order which, on appeal to this court, was reversed in part, affirmed in part, and remanded with directions. Toman v. Park Creative Apt. Bld., Corp. 302 Ill. App. 308. A further appeal was taken to the supreme court where the judgment of the Appellate court was reversed, and the order of the County court reversed, in part, and remanded, with directions, 378 Ill. 752. September 27, 1934, the County Collector, as receiver, filed his final account in the County court, which showed he had a balance of $11,807.35 in his

hands, being taxes collected by him.

Counsel for the insurance company in their brief say: "It does not appear * * * that any disposition was ever made of the $11,807.36 in the hands of said tax receiver." And further, that the Collector, as receiver, "also has $2,199.02 of rents collected as tax receiver of the Circuit Court for which he has not properly accounted. He should also account for rents improperly used to pay penalties which accrued on so much of the taxes as he could have paid out of rents in his hands available therefor. The Circuit Court has jurisdiction and inherent power to require its tax receiver to account for all rents collected, notwithstanding the order purporting to discharge him from further duties as tax receiver appointed by the Circuit Court."

The objections to the insurance company's application to intervene, made by the plaintiff tax receiver and the building corporation are: (1) that the suit was dismissed April 13, 1935, and that leave to file the petition to intervene was not made until November 15, 1941, more than 6 years thereafter, and therefore the court had no jurisdiction to allow the motion. (2) That May 12, 1936, the County Collector filed an Interpleader suit in the Circuit court of Cook county, in which he alleged that a number of tax receivership suits had been brought, including the one in question, and that the claims of the insurance company should be there adjudicated. In that suit it was further alleged in the insurance company's petition, that rents had been collected from several properties and disbursements made; that the Supreme court, June 20, 1934, held that the County courts had no general equity powers to appoint receivers; that their appointment was void; that out of the rents collected $109,617.60 was on deposit in the First National Bank of Chicago; "that claims were made thereon by various persons; that

hands, being taxes collected by him.

Counsel for the insurance company in their brief say:

"It does not appear * * * that any disposition was ever made of the $11,807.59 in the hands of said tax receiver." And further, that the Collector, as receiver, "also has $2,189.02 of rents collected as tax receiver of the Circuit Court for which he has not properly accounted. He should also account for rent & improperly used to pay penalties which accrued on so much of the taxes as he could have paid out of rents in his hands available therefor. The Circuit Court has jurisdiction and inherent power to require its tax receiver to account for all rents collected, notwithstanding the order purporting to discharge him from further duties as tax receiver appointed by the Circuit Court."

The objects as to the insurance company's application to intervene, made by the plaintiff tax receiver and the building corporation are: (1) that the suit was dismissed April 13, 1933, and that leave to file the petition to intervene was not made until November 13, 1941, more than 6 years thereafter, and therefore the court had no jurisdiction to allow the motion. (2) That May 12, 1938, the County Collector filed an Interpleader suit in the Circuit court of Cook county, in which he alleged that a number of tax receivership suits had been brought, including the one in question, and that the claims of the insurance company should be there adjudicated. In that suit it was further alleged in the insurance company's petition, that rents had been collected from several properties and disbursements made; that the supreme court, June 20, 1934, held that the County courts had no general equity powers to appoint receivers; that their appointment was void; that out of the rents collected $109,317.60 was on deposit in the First National Bank of Chicago; "that claims were made thereon by various persons; that

the respective claimants should be required to interplead and the several claims of the several claimants should be adjudicated;" that October 2, 1936, the First National Bank filed its counterclaim in the interpleader suit in which it alleged that there was on deposit in the bank to the credit of the tax receiver, $226,454.44; that "various sums were paid out," leaving still on deposit $109,392.90; that "various persons were making claims thereto," and the prayer of the counterclaim was that the several claimants be required to interplead and that the bank "be permitted to deposit said fund in court and be relieved from all liability for said funds."

In the instant case the record discloses that on April 13, 1935, two orders were entered by the Circuit court in the tax receivership suit, in which the insurance company seeks to intervene. The orders are as follows: "On motion of Plaintiff:- This matter coming on to be heard, and the court being fully advised in the premises:

"It is ordered,adjudged and decreed that the petition heretofore filed in the above entitled cause be and the same is hereby dismissed,without costs." And the other order is: "On motion of plaintiff. This matter coming on to be heard, and the Court being fully advised in the premises.

"It is ordered,adjudged and decreed that the order heretofore entered on the 3rd day of July A.D. 1935 appointing plaintiff as Receiver herein is hereby vacated." [Obviously the year of the order is incorrect. The year mentioned should be 1934.]

October 14, 1935, another order was entered in that case which recited the matter came on to be heard on motion of the tax receiver to approve his final report and account; that notice had been served on all parties; that the court examined the report and

the respective claimants should be required to interplead and the several claims of the several claimants should be adjudicated;" that October 2, 1928, the first National Bank filed its counterclaim in the interpleader suit in which it alleged that there was on deposit in the bank to the credit of the tax receiver, $25,424.44; that "various sums were paid out," leaving still on deposit $109,292.90; that "various persons are making claims thereto," and the prayer of the counterclaim was that the several claimants be required to interplead and that the bank "be permitted to deposit said fund in court and be relieved from all liability for said funds."

In the instant case the record discloses that on April 13, 1928, two orders were entered by the Circuit court in the tax receivership suit, in which the insurance company seeks to intervene. The orders are as follows: "A motion of Plaintiff:- This matter coming on to be heard, and the court being fully advised in the premises:

"It is ordered, adjudged and decreed that the petition heretofore filed in the above entitled cause be and the same is hereby dismissed, without costs." And the other order is: "A motion of plaintiff. This matter coming on to be heard, and the Court being fully advised in the premises,

"It is ordered, adjudged and decreed that the order heretofore entered on the 3rd day of July A.D. 1928 appointing plaintiff as Receiver herein is hereby vacated." [Obviously the year of the order is incorrect. The year mentioned should be 1924.]

October 14, 1928, another order was entered in that case which recited the matter came on to be heard on motion of the tax receiver to approve his final report and account; that notice had been served on all parties; that the court examined the report and

account; that the charges made in the report were fair and reasonable; that the receipts and disbursements were true and correct and that no objections had been filed. And it was ordered that the account be approved and confirmed, and it was further ordered that the receiver be directed and authorized "to deduct from the moneys now on hand the sum of $1,505.40 due to defray the costs and expenses incurred and services rendered herein and that the balance of $3,574.64 be paid over to Park Castles Apartment Building Corp.

"It is further ordered that the order heretofore entered on the 3rd day of July A.D. 1934, appointing Joseph L.Gill as Tax Receiver be and the same is hereby vacated and set aside and said Joseph L. Gill is hereby relieved and discharged of his duties as Tax Receiver."

The record shows three further orders entered by the court May 27, 1935, June 24, 1935 and September 30, 1935 - and December 3, 1935, another order was entered which recited that the tax receiver applied for the approval of his report and account for the period from February 1, 1935, to April 14, 1935, and it appearing that objections had been filed, it was ordered that the defendant, the building corporation, be permitted to examine all of the receiver's accounts and that he be given access to all of the records, etc.

Whether the Circuit court had inherent power to dispose of the moneys remaining in the receiver's hands, in view of all the facts alleged in the petition sought to be filed by the insurance company, although the suit had been dismissed many years prior, need not be decided. But in view of the many similar suits which had been filed in the County and Circuit courts and the claims made to the funds on deposit in the First National Bank by diverse persons, we are of opinion that the matters could not properly be disposed of without having all the parties before

account; that the charges made in the report were fair and reasonable; that the receipts and disbursements were true and correct and that no objections had been filed. And it was ordered that the account be approved and confirmed, and it was further ordered that the receiver be directed and authorized "to deduct from the money now on hand the sum of $1,808.40 due to defray the costs and expenses incurred and services rendered herein and that the balance of $3,874.54 be paid over to Park Heights Apartment Building Corp.

"It is further ordered that the order heretofore entered on the 3rd day of July A.D. 1934, appointing Joseph L. Hill as the receiver be and the same is hereby vacated and set aside and said Joseph L. Hill is hereby relieved and discharged of his duties as the Receiver."

The record shows three further orders entered by the court May 27, 1935, June 24, 1935 and September 30, 1935 - and December 5, 1935, another order was entered which recited that the the receiver applied for the approval of his report and account for the period from February 1, 1935, to April 14, 1935, and it appearing that objections had been filed, it was ordered that the defendant, the building corporation, be permitted to examine all of the receiver's accounts and that he be given access to all of the records, etc.

Whether the Circuit court had inherent power to dispose of the moneys remaining in the receiver's hands, in view of all the facts alleged in the petition sought to be filed by the insurance company, although the suit had been dismissed many years prior, need not be decided. But in view of the many similar suits which had been filed in the County and Circuit courts and the claims made to the funds on deposit in the First National Bank by diverse persons, we are of opinion that the matters could not properly be disposed of without having all the parties before

the court. Viewing the record in the light most favorable to the insurance company, we are of opinion that the right to intervene was not absolute but within the discretion of the court.

The order of the Circuit court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

the court. Viewing the record in the light most favorable to the intervenor company, we are of opinion that the right to intervene was not absolute but within the discretion of the court.

The order of the Circuit court of Cook county appealed from is affirmed.

AFFIRMED.

Hutchett, P. J., and Scanlan, J., concur.

GEN. NO. 9838 AGENDA NO. 18

IN THE APPELLATE COURT OF ILLINOIS.
SECOND DISTRICT
OCTOBER TERM, A.D. 1942

RALPH BOUTON, APPELLEE,	)	
vs.	:	APPEAL FROM THE COUNTY
GEORGE J. HARRISON, APPELLANT.	)	COURT OF PEORIA COUNTY.

HUFFMAN, P. J.

This action was instituted by appellee in a Justice of the Peace Court, to recover property damage sustained to his automobile in a collision between it, and that of appellant. The case was appealed from the Justice Court to the County Court, where a jury returned a verdict for appellee-plaintiff, in the sum of $250. The defendant has appealed from this judgment, and argues four points for reversal. The points so argued are questions of fact, except the last, which is directed toward the instructions of appellee, being two in number.

From a review of the evidence, we are not disposed to disturb the finding of the jury. The first instruction on behalf of appellee, had to do with the measure of damages.

Jan. 1st, 1932 — Agenda No. 12

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1931

RALPH BUSTON, APPELLEE, vs. GEORGE A. HARRISON, APPELLANT.	APPEAL FROM THE COUNTY COURT OF DU PAGE COUNTY.

BURKMAN, P. J.

This action was instituted by appellee in a justice of the Peace Court, to recover property damage sustained to his automobile in a collision between it, and that of appellant. The case was appealed from the justice court to the County Court, where a jury returned a verdict for appellee-plaintiff, in the sum of $250. The defendant has appealed from the judgment, and urges four points for reversal. The points do depend any question of law, except the last, which is directed toward the instructions of appellee, going into in number.

Upon a review of the evidence, we are not inclined to disturb the finding of the jury. The first instruction on behalf of appellee, can be dealt with the measure of damages.

It told the jury that where the property can be repaired, the measure of damages was the cost of such repair; and if the automobile was damaged beyond repair, that then the measure of damage would be the fair, cash, market value of the car at the time of such collision, less the fair, cash, market value of the salvage thereof. This is the import of the instruction, and we believe states the proper rule. Although the second instruction on behalf of plaintiff was not drawn as correctly and completely as it should have been, yet we do not believe it misled the jury. A record need not be free from all error. Beery v. Breed, 311 Ill. App. 469, 480. When it appears that a litigant has not been prejudiced by the defects complained of, or when they are of such a character that they do not materially affect his rights, they may not justify a reversal. In view of the evidence in the case, we are not of the opinion that either of plaintiff's instructions misled the jury in its consideration of the evidence.

The judgment is therefore affirmed.

Judgment affirmed.

It told the jury that where the industry can be regulated, the measure of damage was the loss of such profits; but if the monopolist was due to outside factors, then the measure of damage would be the fair, usual, market value of the car at the time of such cancellation, like the fair, usual, market value of the airplane therein. This is the lapsed of the instruction, and we believe states the proper rule. Although the second instruction on behalf of plaintiff was not drawn as correctly and completely as it should have been, yet we do not believe it misled the jury. A record need not be free from all error. Seery v. Reed, 311 Ill. App. 420, 420. When it appears that a litigant has not been prejudiced by the defects complained of, or when they are of such a character that they do not materially affect his rights, they may not justly be reversed. In view of the evidence in this case, we are not of the opinion that either of plaintiff's instructions misled the jury in the consideration of the evidence.

The judgment is therefore affirmed.

Judgment affirmed.

Gen. No. 9677 Agenda No. 1.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

MARIE LOUISE GRASSLE, ET AL., Appellees, v. ELMER KNOWLES, Appellant, Consolidated with Ben A. Smith, Appellee, v. Elmer Knowles, Appellant.	APPEAL FROM THE CIRCUIT COURT OF WILL COUNTY.

WOLFE,-- J.

This cause is here on leave to appeal granted for review, of an order of the Circuit Court of Will County granting appellees a new trial on the Court's own motion.

The record discloses that on July 1, 1940, about two o'clock A.M., appellant, Elmer Knowles, was driving an automobile in a southerly direction on Federal Route 66 South of the City of Joliet, about

five miles south of its intersection with the Troy road, now Route No. 52. He was accompanied by Richard Haley. Appellee, Ben H. Smith, accompanied by his wife, and by Henry O. Grassle, Guy W. Spiecher, and their respective wives, was driving his car north, and their cars collided. Ben A. Smith instituted suit against appellant and on the same day the other five occupants of his car did likewise. Appellant answered and filed a counterclaim in each suit. The cases were consolidated. Appellees claimed appellant's car suddenly swung across the center line of the pavement into their path. Appellant made a like claim as to the car in which appellees were riding. At the close of all the testimony the court directed a verdict on the counterclaim in favor of all the appellees except Ben A. Smith.

In addition to the general forms of verdict submitted to the jury, two special interrogatories were submitted. One, whether appellant was guilty of wilful and wanton misconduct; the other, whether he was operating his car with ordinary care and caution. The jury answered the first interrogatory in the negative. The second interrogatory was not answered "Yes" or "No." Those words were crossed out by the jury, and immediately below they wrote: "We the jury find the defendant and plaintiffs both guilty of negligence in operating their cars. We feel that neither the plaintiffs or the defendant should recover any damages in this case." None of the forms of verdict were signed by the jury.

five miles distant in the intersection with the trolley road, was struck on Sept. 23. He was accompanied by Edward Keller. Appellee, in a suit accompanied by his wife, and by Jerry C. Isaacs, Jr. T. Grimsley and their respective wives, was driving the car north, and their cars collided. Mrs. C. Keller testified that appellee approached and in the same car the other two occupants of the car did likewise. Appellant answered and filed a counterclaim in suit pit. The cases were consolidated. Appellee testified appellant's car suddenly appeared across the center line of the roadway into their path. Appellant made a like claim as to the car in which appellees were riding. At the close of all the testimony the court directed a verdict on the counterclaim in favor of all the appellees except Jerry C. Isaacs.

In addition to the general issue of verdict submitted to the jury, the special interrogatories were submitted. Mrs. Keller testified she saw Jerry C. Isaacs and Jerry C. Isaacs, Jr. stopped the car which they made the question. The jury answered the first interrogatory in the negative. The second interrogatory was not answered "Yes" or "No." Three cards were returned out by the jury, and immediately before the verdict. The trial judge instructed the jury to write on a card or card in answering their cases. "I feel that defendant has liability to the defendant should however any damage in this case." The verdict of the first of verdict were signed by the jury.

In setting aside the verdict and granting a new trial, the court stated the verdict was contrary to the manifest weight of the evidence, and also stated the verdict was contrary to the instructions of the court. One of the well recognized grounds for setting aside a verdict and granting a new trial is that the verdict is against the manifest weight of the evidence. (Valant v. Metropolitan Life Insurance Co., 302 Ill. App. 196; Barthelman v. Braun, 278 id. 384; Baumeister v. Bowers, 271 id. 332.) The action of the trial court in passing on a question of fact arising by a motion for a new trial will not lightly be disturbed. (Adamsen v. Magnelia, 280 Ill. App. 418; Barthelman v. Braun, supra.)

The appellees excepting one who was asleep on the back seat, testified the Smith car was being driven on the right side of the pavement, from eighteen inches to two feet east of the center line at a speed of about thirty-five miles per hour, and that appellant's car suddenly turned into their path, when only about 100 to 150 feet away. Appellant testified the Smith car was over the center line half a foot or a foot and swerved into his path when about fifty feet away, but he admitted he told appellees' counsel two weeks before the trial that he did not know if the Smith car was over the center line. The testimony shows that after the accident the Smith car was headed northeast with the right hand wheels on the shoulder east of the pavement, and appellant's car was east of the center

In setting aside the verdict and granting a new trial, the court stated that "only one witness, in the manner which at the evidence, and also stated that "only one witness in the instructions of the court. One of the trial requested permit for setting aside a verdict and granting a new trial is that the verdict is against the manifest weight of the evidence. [Citing v. Motropolitan Life Insurance Co., 98 Ill. App. 119; Hamilton v. Crane, 205 Ill. App. Remembler v. Sykes, 211 Ill. App. 24.] The action of the trial court in granting a motion for a remittitur of less relating to a motion for a new trial will not lightly be disturbed. [Alderson v. Appella, 220 Ill. App. 118; Berlinghoff v. Crane, supra.]

The appellee contends, one who was asleep on the back seat, testified the Ford car was being driven on the right side of the roadway, from Kingston toward Ta Ian. Two miles of a power line at a speed of about [illegible] miles per hour, and that appellant's car suddenly turned into their road, from only about 100 to 150 feet away. Appellant testified the Ford car was over the center line half a foot or a foot and swerved back into park when about fifty feet away, but he admitted he still approached somewhat two weeks before the trial, but he did not know if the Ford car was over the center line. The testimony shows that after the accident the Ford car was found partlaway with the right rear wheels on the shoulder and of the roadway, and appellant's car was back of the center

line headed southeast. About two thirds of the left hand side of the front end of each car was mashed.

The testimony shows that a short time prior to the accident, appellant, with Haley in the car, drove to a filling station and tavern at Troy, and asked Raymond Cummings where he could get a drink. The tavern there was closed, and Cummings accompanied them to Norton's, another tavern about five miles southwest of the highway intersection, where they procured beer. Returning, Cummings got out of the car at the intersection. Cummings testified that during that trip appellant twice drove across the black line, and that he, (Cummings,) on each occasion grabbed the steering wheel, and told appellant he should be more careful; and that appellant was apparently asleep or intoxicated. Knowles denied that Cummings got into the car and went to Norton's, but Cummings was corroborated by Haley on this point and also as to their procuring beer at Norton's. Haley also testified he did not remember which side of the center line appellant was and that he was nearly asleep and "kind of dozy."

Where the evidence is in conflict the verdict will not be set aside unless it is clearly and manifestly against the weight of the evidence. (Wright v. Stinger, 269 Ill. App. 224.) In this case the court was justified in setting the verdict aside.

The order setting aside the verdict and granting a new trial is affirmed.

Order Affirmed.

the Medical Institute. About ten minutes after the left hand side of the road and of which he was unaware.

The defendant drove this car a short time prior to the accident, [illegible] appellant, who lived in the car, drove it a little, which [illegible] never at fault, and added thereto [illegible] a return. [illegible] the lorry from the [illegible], and Chandler accompanied them in Morris's [illegible] lorry from the five miles southwest of the Highway Intersection, where they [illegible] been. Morris, [illegible] of the car at the [illegible] intersection. Chandler testified that during that trip appellant [illegible] across the black line, and that he, (Chandler,) on that occasion grabbed the steering wheel, and told appellant to behave [illegible] same [illegible], but that appellant was [illegible] angry or intoxicated. [illegible] denied that Chandler got into the car and went to Perth's, [illegible] was corroborated by Daley on this point and also as to [illegible] drinking beer at Perth's. Daley also testified in his own behalf which is his version of the accident and that he was [illegible] and "kind of sore."

Where the evidence is so conflict the verdict will not be [illegible] unless it is clearly the manifestly against the weight of the evidence. (Pickett v. Tudgay, 102 Ill. App. 624.) In this case the court was justified in setting the verdict aside.

The order setting aside the verdict and granting a new trial [illegible] a mistake.

Order affirmed.

Gen. No. 9840. Agenda No. 19.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

GUY P. NADON, Plaintiff and Appellee, vs. THE CITY OF ELGIN, a Municipal Corporation, et al., Defendant and appellant.	Appeal from Circuit Court, Kane County.

WOLFE,-- J.

On January 23, 1941, Guy P. Nadon filed his complaint in the Circuit Court of Kane County, charging the defendant, the City of Elgin, a Municipal Corporation as being the owner of a certain sidewalk in said city at and near the intersection of Spring and DuPage Street. He alleges it is the duty of said city to keep the sidewalks in a reasonably safe condition so that the parties using said sidewalks would not be injured thereon, but that the defendant negligently and carelessly permitted snow and ice to form in hillocks and ridges on a certain sidewalk, and that the defendant negligently and carelessly

Gen. No. 9944. Agenda No. 19.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

GUY P. MADON, Plaintiff and Appellee,	
va.	Appeal from Circuit Court, Kane County.
THE CITY OF ELGIN, a Municipal Corporation, et al., Defendant and appellant.	

WOLFE, -- 1.

On January 23, 1941, Guy P. Madon filed his complaint in the Circuit Court of Kane County, charging the defendant, the City of Elgin, a Municipal Corporation as being the owner of a certain sidewalk in said city at and near the intersection of Spring and Dupage Street. He alleges it is the duty of said city to keep the sidewalks in a reasonably safe condition so that the parties using said sidewalks would not be injured thereon, but that the defendant negligently and carelessly permitted snow and ice to form in hillocks and ridges on a certain sidewalk, and that the defendant negligently and carelessly

failed to remove such snow and ice from the sidewalk, or to do any other act in regard thereto, so as to render said sidewalk at and near the place, safe for the user thereof, and that the plaintiff, while in the exercise of due care and caution for his own safety, slipped and fell on the said ice and obstruction and was injured thereby.

The complaint also alleged that the plaintiff served upon Perry D. Wells, City Attorney, and H. M. Brightman, the City Clerk of the City of Elgin, a notice wherein he intended to sue the city for the damages that he had sustained. A copy of this notice was attached to the plaintiff's complaint.

The defendant filed its answer in which it admitted the ownership, care of the streets etc., but it denied that it was negligent in the care of the streets, or that snow and ice had accumulated on the street, as alleged in plaintiff's complaint, or that the plaintiff was injured and damaged as claimed. The case was tried before the Court and jury. At the conclusion of the plaintiff's evidence and also at the conclusion of all of the evidence, the defendant made a motion for a directed verdict, but each of said motions were denied. The jury rendered a verdict in favor of the plaintiff for $500.00. The defendant entered a motion for a judgment notwithstanding the verdict, which was overruled. The defendant then made a motion for a new trial, which motion was likewise overruled. A judgment was then entered on the verdict in favor of the plaintiff

failed to remove such snow and ice from the sidewalk, or to do any other act in regard thereto, so as to render said sidewalk at and near the place, safe for the user thereof, and that the plaintiff, while in the exercise of due care and caution for his own safety, slipped and fell on the said ice and obstruction and was injured thereby.

The complaint also alleged that the plaintiff served upon Perry D. Wells, City Attorney, and H. M. Bridgeman, the City Clerk of the City of Elgin, a notice wherein he intended to sue the city for the damages that he had sustained. A copy of this notice was attached to the plaintiff's complaint.

The defendant filed its answer in which it admitted the ownership, care of the streets etc., but it denied that it was negligent in the care of the streets, or that snow and ice had accumulated on the street, as alleged in plaintiff's complaint, or that the plaintiff was injured and damaged as claimed. The case was tried before the Court and jury. At the conclusion of the plaintiff's evidence and also at the conclusion of all of the evidence, the defendant made a motion for a directed verdict, but each of said motions were denied. The jury rendered a verdict in favor of the plaintiff for $300.00. The defendant entered a motion for a judgment notwithstanding the verdict, which was overruled. The defendant then made a motion for a new trial, which motion was likewise overruled. A judgment was then entered on the verdict in favor of the plaintiff

for $500.00, and to reverse this judgment, the City of Elgin has prosecuted this appeal.

Point two of appellant's brief is that no proof of notice to the City of Elgin of the alleged accident was proven in the trial for the appellee. It is argued by the appellant that failure of proof of such notice is fatal to the appellee's case, and they cite several authorities that sustained that contention. It is alleged in plaintiff's complaint that he did give such notice, and a copy of the same is attached to the complaint. Subsection two of Section 164, Chapter 110 of Smith Hurd's Illinois Annotated Statute provides as follows: "Every allegation, except allegation of damages not explicitly denied shall be deemed to be admitted, unless the party shall state in his pleading that he has no knowledge thereof sufficient to form a belief." The defendant did not deny this allegation of plaintiff's complaint, therefore they have admitted it, and proof of the same was unnecessary.

The other points raised by the appellant are questions of fact. They argue seriously that the plaintiff did not prove that he was in the exercise of ordinary care and caution for his own safety, nor did he prove notice to the city of the dangerous condition of the sidewalk. The instructions are not abstracted, but an examination of the record discloses that the jury were fully advised by the defendant's instructions on all of these points, and the jury after hearing the evidence and the instructions of the Court, decided all of these points adversely to the appellant. After reading the evidence as abstracted, it is our conclusion that the verdict of the jury is not against the manifest weight of the evidence, therefore we would not be justified in reversing the case. The judgment of the trial court is hereby affirmed.

Judgment affirmed.

for $500.00, and to reverse this judgment, the City of Elgin has prosecuted this appeal.

Point two of appellant's brief is that no proof of notice to the City of Elgin of the alleged accident was given in accordance for the appellee. It is argued by the appellant that failure of proof of such notice is fatal to the appellee's case, and they cite several authorities that sustained that contention. It is alleged in plaintiff's complaint that he did give such notice, and a copy of the same is attached to the complaint. Subsection two of section 1[illegible], Chapter 110 of Smith Hurd's Illinois Annotated Statute provides as follows: "Every allegation, except allegation of damages not explicitly denied, shall be deemed to be admitted, unless the party shall state in his pleading that he has no knowledge thereof sufficient to form a belief." The defendant did not deny this allegation of plaintiff's complaint, therefore they have admitted it, and proof of the same was unnecessary.

The other points raised by the appellant are questions of fact. They argue seriously that the plaintiff did not prove that he was in the exercise of ordinary care and caution for his own safety, nor did he prove notice to the city of the dangerous condition of the sidewalk. The instructions are not abstracted, but an examination of the record discloses that the jury were fully advised by the defendant's instructions on all of these points, and the jury after hearing the evidence and the instructions of the Court, decided all of these points adversely to the appellant. After reading the evidence as abstracted, it is our conclusion that the verdict of the jury is not against the manifest weight of the evidence, therefore we would not be justified in reversing the case. The judgment of the trial court is hereby affirmed.

Judgment affirmed.

317 Ill. App.
Adv. Sh.
3-15-43

STATE OF ILLINOIS

APPELLATE COURT
October Term, A.D. 1942
THIRD DISTRICT

GEN. No. 9344 HG. No. 6

Jacob O. Browning, Plaintiff-Appellee, -vs- Arden O. Browning and Opal B. Atkeisson, Defendants-Appellants.	In Equity Complaint to Establish Life Estate in Lands and for Accounting. Appeal from the Circuit Court of Montgomery County, Illinois.

Dady, J.

317 I.A. 372

244

This is an appeal from a decree requiring the defendants to pay annually to the plaintiff during his lifetime the net income from 80 acres of land in Montgomery County.

The decree further provided that defendants should pay the plaintiff $625. as the net income already received by them from said real estate during the years 1939 and 1940.

Jacob O. Browning, the plaintiff, and Laura R. Browning, who died about March 8, 1938, were husband and wife. The two defendants, Arden O. Browning and Opal B. Atkeisson, are their children. Fannie E. Orr was the mother of Laura R. Browning, and she was the owner of the real estate involved in this litigation at the time of her death in 1936.

The proofs were heard by the chancellor.

No point is made that there was any variance between the allegations of the complaint as amended and the proofs, or that the relief granted by the decree was not properly based on the allegations and prayer of the complaint. Therefore we see no occasion for setting up any of the allegations of such complaint for we believe the issues before us will be sufficiently presented by stating the material parts of the decree.

The court, in its decree, found that on July 15, 1936, Fannie E. Orr died leaving a will duly admitted to probate, by which she directed that within three years after her death, George C. Browning, executor therein named, sell at public or private sale and convert into cash the real estate in question, and execute the necessary deed of conveyance; that by such will she bequeathed one half of the proceeds of the sale of such real estate to Laura R. Browning; that she bequeathed the remaining one half of such proceeds to George C. Browning in trust, the trustee to pay the income therefrom to Lemuel A. Orr during his natural life, and at his death, if he left no issue then surviving, to pay such remaining one-half to the defendants; that Lemuel A. Orr died about September 25, 1936, without leaving any descendant, and Laura R. Browning died about March 8, 1938; that George C. Browning duly qualified as executor; that in accordance with said will said executor on November 9, 1937, at the solicitation of defendants, conveyed said real estate at private sale to the defendants by deed, the deed reciting a consideration of $5,000; that said lands were worth more than $5,000; that as a part of the consideration for said deed, an agreement was made by and between the defendants and Browning, as executor and individually, Laura R. Browning and the plaintiff, which said agreement was within about two weeks after the date of said deed, reduced to writing and executed and delivered to Laura R. Browning and the plaintiff by the defendants and their respective spouses, in and by which said written agreement defendants, and their respective spouses, agreed that the rents from said lands should be collected by Arden O. Browning for and during the natural life of Laura R. Browning and the plaintiff or the survivor of them, and that, after paying the taxes and all other expenses, all rents arising therefrom ~~was~~ were to be paid by said

The court, in its decree found that on July 15, 1920, Annie E. Orr died leaving a full duty entitled to probate, by which she directed that within three years after her death, George E. Browning, executor thereby named, sell at public or private sale and convert into cash the real estate in question, and execute the necessary deed of conveyance; that by such sale the beneficial one half of the proceeds of the sale of such real estate to James A. Browning; that one hundred the remaining one half of such proceeds to George O. Browning in trust, the trustee to pay the income therefrom to Lemuel A. Orr during his natural life, and at his death, if he left no issue then surviving, to pay such remaining one-half to the defendants; that James A. Orr died about September 20, 1920, without leaving any descendant, and James E. Browning died about March 1, 1920; that George O. Browning duly qualified as executor; that in accordance with said will said executor on November 2, 1920, at the solicitation of defendants, conveyed said real estate at private sale to the defendants by deed, the deed recitting a consideration of $4,000; that said lands were worth more than $6,000; that as a part of the consideration for said deed, an agreement was made by and between the defendants and Browning, as executor and individually, James E. Browning and the plaintiff, which said agreement was within about two years after the date of said deed, reduced to writing and executed and delivered to James E. Browning and the plaintiff by the defendants and their respective spouses, in and by which said written agreement defendants, and their respective spouses, agreed that the rents from said lands should be collected by James E. Browning for and during the natural life of James E. Browning and his executors or the survivor of them, and that, after paying the taxes and all other expenses, all rents received thereon be so held by said

Arden O. Browning to the plaintiff and Laura R. Browning during their natural ~~life~~ lives and then to the survivor of them; that a further consideration for the executing of said agreement was the changing of the beneficiary in a policy of insurance on the life of Laura R. Browning, deceased, from the plaintiff to the defendants; that a copy of said agreement, so signed by the defendants and their respective spouses, was in the possession of plaintiff, but that about a year after the execution thereof the same became lost, mislaid, destroyed or stolen and that notice to produce a copy thereof was duly given to the defendants, but that the same was not produced by them or either of them, and that after the death of Laura R. Browning and the execution of such agreement the defendants received $4,000 insurance as beneficiaries under such policy, ~~contrary,~~ from which they paid all mortgage indebtedness on said land and paid over the balance to the plaintiff; and that the defendants paid to plaintiff the rents and profits from said real estate for the first year after the delivery of said deed, but thereafter refused to pay any part thereof.

By its decree the court adjudged and decreed the defendants to be the owners of said real estate; that during the lifetime of the plaintiff it was their duty, under said agreement, after the payment of taxes and expenses of the operation of the farm, to pay to the plaintiff all that remained therefrom; that the defendants pay to the plaintiff $662.50 as the net amount due for the years 1939 and 1940; that defendants, during the lifetime of plaintiff, account and pay to plaintiff all rents, issues and profits from said real estate subsequent to the year 1940, first deducting the taxes and expenses of harvesting the produce therefrom and maintaining said farm.

Aiden O. Bowering to the plaintiff are false. Bowering testify that
[illegible] was taken by the defendant of them; that a financial consideration for the assuming of said indemnity was the surrender of the beneficiary in a policy of insurance on the life of James E. Bowering, deceased, from the plaintiff to the defendants; that a copy of said agreement, so signed by the defendants and their respective spouses, was in the possession of plaintiff, but that about a year after the execution thereof the same became lost, stolen, destroyed or misplaced and that notice to produce a copy thereof was duly given to the defendants, but that the same was not produced by them or either of them, and that after the death of James E. Bowering and the execution of such agreement the defendants received as, and therefore as beneficiaries under such policy, from which they paid all surplus indebtedness on said life and paid over the balance to the plaintiff; and that the defendants said to plaintiff the words and phrase set forth and said and while the plaintiff was after the delivery of said lost, but thereafter refused to pay any part thereof.

By the terms the court adjudged and decreed the defendants to be the owners of said real estate; that during the lifetime of the plaintiff it was their duty, under said agreement, after the payment of their own residue of the indebtedness of the farm, to pay to the plaintiff all that remained thereafter; that the defendants pay to the plaintiff $1000.00 as the net amount due for the rents and profits, that defendants, during the lifetime of plaintiff, account and pay to plaintiff all rents, issues and profits from said real estate subsequent to the year 1920. Plaintiff demanding the sums and exceeds of foreclosing the mortgage thereon and satisfying said lien.

The defendants first contend that the court erred in denying their motion to strike the complaint as amended. The only ground argued in this court on such contention is that it is evident from such complaint that evidence of the alleged written agreement referred to in said decree was not admissible to vary, alter or cut down the terms of the deed in question and that even if proven the admission of such evidence would violate the parol evidence rule as there was no allegation that such written agreement was under seal, as was the deed. For the reasons hereinafter stated in disposing of the case on the merits, it is our opinion that the court did not err in denying such motion.

Defendants contend the evidence is too indefinite and uncertain to justify the decree. We do not consider it useful or necessary to give any detailed statement of the evidence. Having in mind the rule of law that strong and conclusive evidence is required to establish lost writings involving title to real estate, and that such evidence must be clear and convincing in every respect (Shipley v. Shipley, 274 Ill. 506), we consider it sufficient to say we have carefully read the evidence and in our opinion the trial court, evidently believing the evidence favorable to plaintiff, was clearly justified in making the findings of fact above set forth.

The principal and decisive question is whether or not evidence of such agreement was competent.

We believe that the defendants have misapprehended the legal effect of the agreement found to have been executed by them. In Browning v. Browning, 379 Ill. 29, this same proceeding was before our Supreme Court on transfer from this court. The Supreme Court ordered the cause transferred back to this court on the ground that a freehold was not involved. In so

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We believe that the defendants have misapprehended the legal effect of the agreement found to have been executed by them. In Brewning v. Brewning, 270 Ill. 89, this same proceeding was before our Supreme Court on transfer from this court. The Supreme Court ordered the cause transferred back to this court on the ground that a freehold was not involved. In so

doing the Supreme Court said: "It will be observed that the decree appealed from does not create a life estate in the lands in appellee. It merely directed appellants to make annual payments to appellee, the amount of such payments to be the net rents. The payment of the same did not in any way affect appellants' title in the land. Appellee does not question the decree in that regard either by cross-appeal or cross-error. Appellants claim appellee was not entitled to any relief and argue questions pertaining to the evidence, the applicability of the Statute of Frauds, and the failure to join the executor as a party to the suit. It is obvious that whatever disposition may be made of the errors urged for reversal it can in no way change appellants' title in the land. Whether the decree was correct in not giving appellee a life estate is not before the court. * * * The pleadings involved a freehold, but the errors relied upon * * * do not, and under such condition of the record a freehold is not involved so as to give this court jurisdiction on a direct appeal."

It therefore follows there is no merit to the contention of the defendants that evidence of such written agreement was inadmissible as varying, altering or cutting down the terms of such deed.

Likewise there is no merit to the contention that the admission of such evidence violated any parol evidence rule. The parol evidence rule does not preclude the reception of parol evidence that does not tend to vary or contradict the written instrument already received in evidence, (McDonald v. Danahy, 196 Ill. 133.) Evidence of a collateral agreement made contemporaneous with or subsequent to the principal agreement may be shown if it is consistent with the provisions of the principal

Delay the Supreme Court said: "It will be observed that the Supreme appellate Court does not create a life-saving in (1) lying in appellee. It merely directed appellants to make formal payments to appellee, the payment of such payments to be an act itself. The payment of the same did not in any way affect appellants' title in the land. Appellee does not question the fact that payment either by cross-deposit or cross-payment appellants claim appellee was not entitled to her relief and raise questions pertaining to the evidence, the sufficiency of the statute of frauds, nor the failure to find the consideration a party to the suit. It is obvious that statutory limitation may be made of the cross-term for payment it was in no way change appellants' title in the land. Further the record was correct in not giving appellee a life estate in not before the court. * * * The plaintiff involved a transaction, but the proofs relied upon * * * do not, and under such conditions of the record a transfer is not involved, so as to give the Supreme Court jurisdiction on a direct appeal."

It therefore follows there is no merit of the cross-error of the defendants that evidence of the written agreement was inadmissible as varying, altering or adding from the terms of such deed.

Likewise there is no right to the contention that the admission of such evidence violates the parol evidence rule. The parol evidence rule does not prohibit the reception of parol evidence that does not tend to vary or contradict the written instrument clearly recited in evidence. (Kansas v. Fenton, 124 Kan. 124.) Evidence of a collateral agreement also contemporaneous with or subsequent to the written instrument may be shown if it is consistent with the written terms of the instrument

agreement. (Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88.) Parol evidence can always be introduced to show the true consideration for a deed provided that such showing does not change or defeat the legal operation and effect of such deed. (Lloyd v. Sandusky, 203 Ill. 621; Metzger v. Emmel, 289 Ill. 52.)

The only other complaint of defendants is that George C. Browning, as executor, was not made a party defendant. No relief was asked against him and he was not affected by the decree. Therefore there was no occasion for making him a party.

The decree of the circuit court is affirmed.

Affirmed.

agreement. (Young v. Lillibridge & Co., 66 Ill. App.)

Parol evidence can always be introduced to show the true consideration for a deed, provided that such showing does not change or defeat the legal operation and effect of such deed. (Myers v. Sherman, 103 Ill. 621; Kistner v. Kempf, 104 Ill. App.)

The only other complaint of defendants is that George C. Brewster, as executor, was not made a party defendant. No relief was sought against him and he was not affected by the decree. Therefore there was no occasion for making him a party.

The decree of the circuit court is affirmed.

Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A. D. 1942.

General No. 9344

Agenda No. 6

JACOB O. BROWNING, Plaintiff-Appellee,	)	
	)	Appeal from the Circuit Court of Montgomery County, Illinois.
-vs-	)	
ARDEN O. BROWNING and OPAL B. ATKEISSON, Defendants-Appellants.	)	

Per Curiam:

Appellants have filed a petition for rehearing.

The only ground urged in the petition is that our opinion erroneously states that "No point is made that * * * the proofs or that the relief granted by the decree was not properly based on the allegations and prayer of the complaint." Appellants contend that the "complaint ends with a prayer 'that a decree of this court be returned establishing a life estate in and to said premises in the plaintiff'." As a matter of fact the complaint ends with a prayer that "plaintiff have such other and further relief * * * as equity may require and to the court shall seem meet." A general prayer for relief is sufficient to support any decree warranted by the facts alleged in the bill and established by the evidence. Geiger v. Merle, 360 Ill. 497.

The petition for rehearing is denied.

Appellants have filed a petition for rehearing.

The only ground urged in the petition is that our opinion erroneously states that "it appears in this case that a * * * the proceed on that the relief granted by the decree was not properly based on the allegations and prayer of the complaint." Appellants contend that the "complaint was filed with a prayer 'that a decree of this court be rendered establishing a life estate in and to said premises in the plaintiff'." As a matter of fact the complaint ends with a prayer that "plaintiff have such other and further relief * * * as equity may require and to the court shall seem meet." A general prayer for relief is sufficient to support any decree warranted by the facts alleged in the bill and established by the evidence. Dalton v. Wells, 181 Ill. 427.

The petition for rehearing is denied.

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General number 9335. Agenda number 16.

IN THE APPELLATE COURT 31 I.A. 372

OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM, A.D. 1942

FRANK P. HOHIMER, Plaintiff-Appellant,	APPEAL FROM THE CIRCUIT COURT OF MENARD COUNTY.
-vs-	
CORNELIUS FRICKE, Defendant-Appellee.	~~HONORABLE A. CLAY WILLIAMS, Judge presiding.~~

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HAYES, J.:

This is an appeal from a judgment in favor of Cornelius Fricke, defendant, in an action brought for personal injuries by the plaintiff, Frank P. Hohimer. The case was tried by a jury and resulted in a verdict in favor of the plaintiff in the sum of $2,076.65. Upon motion of defendant the Trial Court entered a judgment in favor of the defendant non obstante veredicto.

The complaint consisted of three original counts, and one additional count filed after the verdict, all of which alleged wanton and wilful conduct. Defendant in his answer denied the same setting up an affirmative defense that plaintiff was guilty of the same conduct as the driver of the car because he was riding in the front seat and had the same opportunity to see and discover danger as defendant had.

There does not seem to be a great deal of conflict in the evidence. The plaintiff was injured at a street intersection with the main line of the C. & I. M. Railway in Petersburg, Illinois, while riding with the defendant in defendant's

General number 9705. Agenda number 15.

IN THE SUPREME COURT
OF ILLINOIS
FIFTH DISTRICT
OCTOBER TERM, A.D. 1962

FRANK E. BOSLEY, Plaintiff-Appellee,	APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY.
-vs-	
CONTINUE TRUCKS, Defendant-Appellee.	Jefferson County.

HOLDS, J.:

This is an appeal from a judgment in favor of Continental Trucks, defendant, in an action brought for personal injuries by the plaintiff, Frank E. Bosley. The case was tried by a jury and resulted in a verdict in favor of the plaintiff in the sum of $[illegible],000.00. Upon motion of defendant the Trial Court entered a judgment in favor of the defendant non obstante veredicto.

The complaint consisted of three original counts, and one additional count filed after the verdict, all of which alleged negligence and wilful conduct. Defendant in its answer denied the same relying on an affirmative defense that plaintiff was guilty of the same conduct as the driver of the car because he was riding in the front seat and had the same opportunity to see and discover danger as defendant had.

There does not seem to be a great deal of conflict in the evidence. The plaintiff was injured at a street intersection with the main line of the C. & I. R. Railway in Peterstown, Illinois, while riding with the defendant in defendant's

automobile at about one o'clock P.M. on Sunday, January 7, 1940,--said automobile being struck by a locomotive. Plaintiff's daughter Kathryn rode in the back seat of the car, her father rode in the front seat on the right-hand side, and the defendant drove the car,--which was a four-door Sedan. The street in question was known as Taylor Street, running in an easterly and westerly direction, and the railroad, which ran north and south, intersected it at a right angle. The railroad was laid on Fourth Street. The main line of the railroad was located on the east side of Fourth Street and the switch track was immediately west of it. Next to the switch track was that part of Fourth Street used for general travel which was about 15 or 20 feet wide. West of that was a spur track that crossed Taylor Street and ran along the east side of the Armour Cheese building, said building being on the southwest corner of the intersection. This ~~building~~ was a two-story building which sat adjacent to the west line of Fourth Street and fairly close to the south line of Taylor Street. Where Taylor Street crossed the spur track there was a plank crossing sufficiently wide for double traffic, but where it crossed the siding and the main line, the plank was only for single traffic. The cheese factory shut off the view of any automobile going east on Taylor Street from trains approaching said intersection from the south. The plaintiff requested the defendant to slacken his speed about two blocks from the intersection, and it appears from the evidence on both sides that the defendant, as he approached the intersection, was going at a moderate speed. The ground was covered with snow which had fallen the night before. There had been one track made in the snow along Taylor Street in the block leading up to the railroad crossing. At the school house, two blocks west of the railroad crossing, defendant had applied his brakes to avoid running over a child on a sled. It appeared that his brakes worked and he did not skid at that point. As they came to the railroad crossing

automobile at about one o'clock P.M. on Sunday, January 7, 1940,--said automobile being struck by a locomotive. Plaintiff's daughter Kathryn, rode in the back seat of the car, her father rode in the front seat on the right-hand side, and the defendant drove the car,--which was a four-door sedan. The street in question was known as Taylor Street, running in an easterly and westerly direction, and the railroad, which ran north and south, intersected it at a right angle. The railroad was like on Fourth Street. The main line of the railroad was located on the east side of Fourth Street and the switch track was immediately west of it. Next to the switch track was that part of Fourth Street used for general travel which was about 18 or 20 feet wide. West of that was a spur track that crossed Taylor Street and ran along the east side of the Beaver Cheese building, said building being on the southeast corner of the intersection. This building was a two-story building which was adjacent to the west line of Fourth Street and fairly close to the south line of Taylor Street. Where Taylor Street crossed the spur track there was a plank crossing sufficiently wide for double traffic, but where it crossed the siding and the main line, the plank was only for single traffic. The cheese factory shut off the view of any automobile going east on Taylor Street from trains approaching said intersection from the south. The plaintiff represented the distance as fifteen or twenty feet, but the blocks from the intersection, and it appears from the evidence on both sides that the intersection, as he approached the intersection, was going at a moderate speed. The ground was covered with snow which had fallen the night before. There had been one track made in the snow along Taylor Street in the block leading up to the railroad crossing. At the school house, two blocks west of the railroad crossing, Lindsey had lighted his brakes to avoid running over a child on a sled. It appeared that his brakes worked and he did not sled at that point. As they came to the railroad crossing

plaintiff testified that he watched for a train but did not see or hear anything; that before reaching the cheese factory spur track, however, he saw the train approaching on the main track from the south and warned the defendant by stating, 'there comes a train', and at the same time his daughter Kathryn did the same. It appears from the evidence that eighty feet west of the main line a train coming from the south can be seen seventy five feet south of the crossing. The train was traveling at about forty miles an hour and the automobile from fifteen to twenty miles an hour. The automobile continued to go east on Taylor Street, and stopped upon the crossing over the main track in front of the approaching train where it was struck. Just before the collision, the defendant removed his right arm from the steering wheel and threw it around the plaintiff. It appears that there was the usual cross-arm sign at this crossing, and both plaintiff and defendant were familiar with the crossing. It further appears from the evidence that before the car was struck by the locomotive, the left front wheel went off the plank and on to the main line track. Defendant testified that he applied his brakes as he came up to the main line, but the car skidded ahead. Witness Bell who stood about one hundred feet away, corroborated the defendant in his testimony on the application of the brakes and said that if defendant had continued the same speed without applying the brakes he would have cleared the crossing ahead of the train. Both the plaintiff and defendant had been intimate friends for sometime prior to this, and on the day in question the defendant was helping the plaintiff in a plumbing job at plaintiff's house and they had gone to get a vise to be used in the work.

Under the circumstances as shown by the evidence for the defendant, to drive up to a railroad crossing covered with ice and snow, and obstructed as this was; to pass the spur trac'

plaintiff testified that he refused for a train but did not see or hear anything; that before reaching the crossing factory spur track, however, he saw the train approaching on the main track from the south and warned the defendant by stating, 'there comes a train', and at the same time his daughter jumped out the car. It appears from the evidence that slightly west of the main line a train coming from the south can be seen several hundred feet south of the crossing. The train was travelling at about forty miles an hour and the automobile from fifteen to twenty miles an hour. The automobile continued to go east on Taylor Street, and stopped upon the crossing over the main track in front of the approaching train where it was struck. Just before the collision, the defendant removed his right arm from the steering wheel and threw it around the plaintiff. It appears that there are the usual cross-arm signs at this crossing, and both plaintiff and defendant were familiar with the crossing. It further appears from the evidence that before the car was struck by the locomotive, the left front wheel went off the plank and on to the main line track. Defendant testified that he applied his brakes as he came up to the main line, but the car skidded ahead. Witness Hall who stood about one hundred feet away, corroborated the defendant in his testimony as to the application of the brakes and said that if defendant had continued the same speed without applying the brakes he would have cleared the crossing above of the train. Both the plaintiff and defendant had been intimate friends for considerable under to this, and on the day in question the defendant was helping the plaintiff in a plumbing job at plaintiff's house and they had gone to get a view to be used in the work.

Under the circumstances as shown by the evidence for the defendant, to drive up to a railroad crossing covered with ice and snow, and complicated by this way; to have the auto tied

after he saw the train coming; to pass the traveled portion of Fourth Street and not turn to the right or left on Fourth Street but continue on Taylor Street and pass over the side-track, and then on to the main line and stall his car with the left wheel off the crossing plank, warranted the trial court in submitting the case to the jury on the question of negligence of defendant. The question of whether or not plaintiff was equally reckless, in sitting in the front seat, is a serious question. Under the law, a passenger riding in an automobile is required to exercise due diligence for his own safety, and to watch out for danger and warn the driver. If the plaintiff failed to exercise reasonable diligence in keeping with the dangerous situation that surrounded him as the car approached this crossing, he is barred from recovery.

Where there is any evidence which taken with its reasonable inference in its aspect, most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law. In determining such question the Court can examine the record only to determine whether there is any evidence so tending to support due care on the part of the plaintiff. Dee v. City of Peru, 343 Ill. 36.

There is some evidence of due care on the part of the plaintiff namely, his watching for a train as they approached the crossing, his discovery of the train as soon as his line of vision was cleared from the corner of the cheese factory, and his giving immediate warning, also his request to slacken speed two blocks back. We find that this evidence warranted the trial court in denying a motion for a directed verdict at the close of plaintiff's case, also at the close of all the evidence, and made it a proper case to be submitted to a jury to be passed on as a question of fact.

Controverted questions of fact are to be submitted to

after he saw the train coming; to note the toward position of
French Street and not look to the right or left on French Street but continue on Taylor Street and over over the side-walk, and then on to the main line and still he was with the left wheel off the crossing plank, necessitating the train coming to something the case to the jury as the question of negligence of defendant. The question of whether or not plaintiff was guilty contributory in sitting in the front seat, is a serious question. Under the law, a passenger riding in an automobile is required to exercise due diligence for his own safety, and to watch out for danger and warn the driver. If the plaintiff failed to exercise reasonable diligence in keeping with the dangerous situation that arrangement gave as the car approached this crossing, he is barred from recovery.

There comes in any evidence which taken with its reasonable inference in his favor, most favorable to the plaintiff, tends to show the use of the car. The question of fact comes to one for the jury. Whether there is any such evidence is a question of law. In considering such question the court can examine the record only to determine whether there is any evidence on tending to support the case on the part of the plaintiff. Dow v. City of Ind., 241 Ill. 85.

There is some evidence of due care on the part of the plaintiff namely, his attention for a train as they approached the crossing, his discovery of the train as soon as his line of vision was cleared from the corner of the house facing, and his giving immediate warning, also his request to fireman speed the engine. We find that this evidence supported the trial court in having a motion for a directed verdict at the close of plaintiff's case, also at the close of all the evidence, but made it a proper case to be submitted to a jury to be passed on as a question of fact.

Controverted questions of fact are to be submitted to

the jury for its consideration and determination. McFarlane v. Chicago City Railway Company, 288 Ill. 476. In Capelle v. Chicago & Northwestern Railway Company, 280 Ill. App. 471, it was stated, "The trial court has no more power to weigh and determine controverted questions of fact under the present Practice Act, than it had prior thereto. In furtherance of the general principle that it is preferable that cases involving questions of fact should be disposed of on their merits by a jury, rather than upon formal motions, a trial court after denying a motion for an instructed verdict for defendant, at the close of plaintiff's evidence and again at the close of all the evidence, should not render nugatory the verdict of a jury returned on disputed questions of fact, by rendering a judgment non obstante veredicto in favor of such defendant; but if the court is dissatisfied with the verdict under the evidence, he should grant a new trial instead."

As in the Capelle case the trial court upon correctly passing on the peremptory motions, and having a jury try the questions of fact, should not have reversed itself after a verdict in favor of the plaintiff by entering a judgment non obstante veredicto, but if it was dissatisfied with the verdict because it was not supported by the evidence should have waited until a motion for a new trial was made and then allowed a new trial.

The judgment of the trial court is reversed and this cause remanded with directions to overrule defendant's motion for judgment for the defendant notwithstanding the verdict.

Reversed and Remanded
with directions.

the jury for its consideration and determination." Waterline v. Chicago City Railway Company, 208 Ill. 472. In Appelle v. Chicago & Northwestern Railway Company, 210 Ill. 470. 471, it was stated, "The trial court has no more power to weigh and determine controverted questions of fact under the present practice act, than it had prior thereto. In furtherance of the general principle that it is preferable that cases involving questions of fact should be disposed of on their merits by a jury, rather than upon formal motions, a trial court after denying a motion for an instructed verdict for defendant, at the close of plaintiff's evidence and again at the close of all the evidence, should not remove merritory the verdict of a jury returned on disputed questions of fact, by rendering a judgment non obstante veredicto in favor of such defendant; but if the court is dissatisfied with the verdict under the evidence, he should grant a new trial instead."

As in the Orselle case the trial court upon correctly passing on the peremptory motions, and having a jury try the questions of fact, should not have reversed itself after a verdict in favor of the plaintiff by entering a judgment non obstante veredicto, but if it was dissatisfied with the verdict because it was not supported by the evidence should have waited until a motion for a new trial was made and then allowed a new trial.

The judgment of the trial court is reversed and this cause remanded with directions to overrule defendant's motion for judgment for the defendant notwithstanding the verdict.

Reversed and remanded

with directions.

GEN. NO. 9823 AGENDA NO. 12

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1942

J. L. HALLFORD and B. L. TOCKMAN, APPELLEES,	)	
vs.	:	APPEAL FROM THE CIRCUIT
KATHARINE E. MOHRMANN, ET AL., (J. E. BAIRSTOW, APPELLANT).	)	COURT OF LAKE COUNTY.

HUFFMAN, P. J.

This case was previously before this court, and is reported in 305 Ill. App. 661. Appellee Hallford was the legal holder of a Master's Certificate of Sale of a farm, issued pursuant to a mortgage foreclosure. Appellee Tockman was a judgment creditor of the mortgagors. Shortly before the fifteen month period had expired, appellant Bairstow became the holder of $15,000, of judgment notes against the mortgagors. He put these notes in judgment, secured $11,999.20, from Mr. Amsler, a banker, which was the amount necessary for the redemption from the foreclosure

GEN. NO. 9283 AGENDA NO. 12

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1942

G. L. HALLIFORD and R. L. TOCKMAN, APPELLEES, vs. RATHBURNE E. WORKMAN, ET AL., (J. E. PALMETON, APPELLANT)	APPEAL FROM THE CIRCUIT COURT OF LAKE COUNTY.

BOTTMAN, P. J.

This case was previously before this court, and is reported in 305 Ill. App. 601. Appellee Halliford was the legal holder of a Master's Certificate of Sale of a farm, issued pursuant to a mortgage foreclosure. Appellee Tockman was a judgment creditor of the mortgagors. Shortly before the fifteen month period had expired, appellant Palmeton posses the holder of $15,000, of judgments rendered against the mortgagors. He put these notes in judgment, secured $11,009.20, from Mr. Amelor, a banker, which was the amount necessary for the redemption from the foreclosure

sale, and thereupon paid this amount to the Sheriff for the purpose of making redemption, and requested a sale of the premises upon execution issued pursuant to his judgment. The appellees in this case then filed their suit to restrain the Sheriff from making sale pursuant to execution issued upon Bairstow's judgment. An appeal was prosecuted in that case. The decree was reversed and remanded. A full statement of the facts will appear in the former opinion.

Upon an entry of decree by the lower court, pursuant to the remanding order in the former case, Bairstow filed a petition for the allowance of money damages occasioned by the wrongful suing out of the injunction by appellees herein. The damages claimed consist of seven items, totaling $5,656.17. The circuit court denied appellant's claim in all respects, and it is from such order, appellant prosecutes this appeal.

The damage claimed by appellant is itemized on page 36 of his brief, as follows:

(a)	Interest on $13,200 at 6% for 2½ years	$1,980.00
(b)	Interest on the judgment for $15,100 during 2½ years injunction was in force	1,927.50
(c)	Insurance premiums during the 2½ year period	172.50
(d)	Taxes which accrued or were paid during the 2½ year period	708.82
(e)	The sum Bairstow agreed to pay Amsler as additional commission to keep the option in force during the pendency of injunction	300.00

sale, and thereupon paid his account to the Sheriff for the purpose of making redemption, and repressed a sale of the premises upon execution issued pursuant to his judgment. The appellees in this case then filed their suit to restrain the Sheriff from making sale pursuant to execution issued upon Bairstow's judgment. To appeal was prosecuted in that case. The decree was reversed and remanded. A full statement of the facts will appear in the former opinion.

Upon an entry of decree by the lower court, pursuant to the remanding order in the former case, Bairstow filed a petition for the allowance of money damages occasioned by the wrongful suing out of the injunction by appellees herein. The damages claimed consist of seven items, totaling $4,656.17. The circuit court denied appellant's claim in all respects, and it is from such order, appellant prosecutes this appeal.

The damage claimed by appellant is listed on page 55 of his brief, as follows:

(a) Interest on $13,000 at 6% for 2½ years.....	$1,690.00
(b) Interest on the judgment for $16,100 during 2½ years injunction was in force.....	1,207.50
(c) Insurance premium during the 2½ year period.....	172.00
(d) Taxes which accrued or were paid during the 2½ year period.....	708.55
(e) The sum Bairstow agreed to pay Ameler as additional consideration to keep his option in force during the pendency of injunction....	300.00

(f)	Amount Bairstow paid or became obligated to pay Minard E. Hulse, Attorney for Amsler, in connection with the loan.....	300.00
(g)	Sheriff's costs for advertising sales.....	49.20
(h)	Court Reporter's Fees.....	80.50
(i)	Printing Briefs.....	137.65

With respect to item (a), which is for interest claimed upon the redemption money paid, we are of the opinion that section 21 of the Judgment and Execution Act (Ch. 77, sec. 21, Ill. St.), takes care of such claim.

With respect to item (b), which is for interest claimed upon appellant's judgment, we are of the opinion that the same bears interest, pursuant to sec. 7, of the above act.

Items (c) and (d), consisting of insurance premiums and taxes, are items of expense which appellant would have paid had he obtained the property at the time of his attempted sale.

Item (f) is waived, pursuant to statement of appellant.

Item (g), consisting of Sheriff's costs for advertising execution sale, is covered by the Statute.

Items (h) and (i) are not proper allowances to be included in this case. They are costs incident to the former appeal.

Item (e), in the sum of $300, is claimed by appellant as damages based upon his dealings with the banker, Mr. Amsler. According to appellant's testimony, the redemption

(f) Amount whether paid or become obligated to pay without d. notice, attorney for insurer, in accordance with the form..... 500.00

(g) Sheriff's costs for advertising sales..... 42.20

(h) Court reporter's fees..... 30.50

(i) Printing briefs..... 327.85

With respect to item (a), which is for interest claimed upon the redemption money paid, we are of the opinion that section 21 of the Judgment and Execution act (Ch. 77, sec. 21, Ill. St.), takes care of such claim.

With respect to item (b), which is for interest claimed upon appellants's judgment, we are of the opinion that the same bears interest, pursuant to sec. 7, of the above act.

Items (c) and (d), consisting of insurance premiums and costs, are items of expense which appellant would have paid had he obtained the property at the time of his attempted sale.

Item (f) is waived, pursuant to statements of appellant.

Item (g), consisting of Sheriff's costs for advertising execution sale, is waived by the statute.

Items (h) and (i) are not proper allowances to be included in this case. They are costs incident to the former suit.

Item (e), in the sum of $500, is claimed by appellant as damages based upon his dealings with the bankrupt, Kr. Kessler. According to appellant's testimony, the redemption

money was advanced him by Mr. Amsler upon a six month contract, that when appellees instituted the injunction suit, the proceedings were delayed and he was compelled to agree to pay $300, in order to secure a continuance of his redemption contract until the final conclusion of the litigation. There is no evidence to dispute this claim, and it would appear to be a direct damage to appellant occasioned by the action of appellees. We are of the opinion such claim should have been allowed.

The order and decree of the circuit court is therefore reversed and remanded with directions to grant item (e) in the sum of $300, to appellant, and against appellees, as damages sustained. In all other respects the decree is affirmed.

Affirmed in part, reversed in part,
and remanded with directions.

money was advanced him by Mr. Amsler upon a six month contract, that when appellees instituted the injunction suit, the proceedings were delayed and he was compelled to agree to pay $300, in order to secure a continuance of his redemption contract until the final conclusion of the litigation. There is no evidence to dispute this claim, and it would appear to be a direct damage to appellant occasioned by the action of appellees. We are of the opinion such claim should have been allowed.

The order and decree of the circuit court is therefore reversed and remanded with directions to grant item (e) in the sum of $300, to appellant, and against appellees, as damages sustained. In all other respects the decree is affirmed.

Affirmed in part, reversed in part, and remanded with directions.

Abstract

Gen. No. 9834. Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

CHRISTINE HURFF, Plaintiff-Appellee,	)	
vs.	)	Appeal from Circuit Court, Peoria County.
HARRY L. HURFF, Defendant-Appellant.	)	

WOLFE,-- J.

On September 12, 1940, Christine Hurff filed her complaint in the Circuit Court of Peoria County, alleging that her husband had deserted her and that she was then living separate and apart from him without fault on her part. She asked for a decree of separate maintenance. She alleged that the separation took place on July 2, 1939. She charged the defendant, her husband, with being quarrelsome and abusive toward her, and that he endeavored to compel her to obtain a divorce from him. The defendant filed his answer admitting that they did not live together and had not done so since July 4, 1939. He denied all

Gen. No. 7234. Agenda No. 14.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TERM TERM, A. D. 1942.

GINGISKHAN KHAN, Plaintiff-Appellee,	)	
	)	Appeal from
vs.	)	Circuit Court,
	)	Kane County.
BATMAN T. HOWE, Defendant-Appellant.	)	

BOLEK,-- J.

On September 12, 1940, Gingiskhan Khan filed her complaint in the Circuit Court of Kane County, alleging that her husband had deserted her and that she was then living separate and apart from him without fault on her part. She sought for a decree of separate maintenance. She alleged that the separation took place on July 2, 1939. She charged the defendant, her husband, with being quarrelsome and abusive toward her, and that he endeavored to compel her to obtain a divorce from him. The defendant filed his answer admitting that they did not live together and had not done so since July 4, 1939. He denied all

the charges made against him, and claimed that the separation was by consent, and that he had attempted to effect a reconciliation with his wife, but that she had refused.

The case was referred to the Master in Chancery to take the proof. The plaintiff and the defendant were the only witnesses. She testified to many acts of incompatibility and of quarrels, and introduced documentary evidence tending to support her case. The defendant then testified on his own behalf. The Master found that the plaintiff's proof sustained her allegations in the complaint, and recommended that a decree of separate maintenance be granted the plaintiff. To this report, the defendant filed objections, which were overruled by the Master. Exceptions to the Master's Report were filed in the Circuit Court. The Court overruled the exceptions, and entered a decree in accordance with the Master's Report, and it is from this decree that the appeal is prosecuted.

The questions of law involved in this case are not in dispute. It is purely a question of fact, and most of which are not in dispute. It is agreed by both parties that they had been drifting apart, for several years, and the parting of the ways became inevitable. The parties had three daughters, which in good faith, had tried to bring about a reconciliation between their parents, but had failed, and the parents finally parted.

The trial court has found that the wife was living separate and apart without fault on her part, and that the defendant, the husband,

the court made against him, and claimed that the separation was by consent, and that he had attempted to effect a reconciliation with his wife, but that she had refused.

The case was referred to the Master in Chancery to take the proofs. The plaintiff and the corroborator were the only witnesses. The testified to many acts of inconsiderability and of quarrels, and introduced documentary evidence tending to support her case. The defendant then testified on his own behalf. The Master found that the plaintiff's proof established her allegations in the complaint, and recommended that a decree of separate maintenance be granted the plaintiff. On this report, the defendant filed objections, which were overruled by the Master. Exceptions to the Master's report were filed in the Circuit Court. The Court overruled the exceptions, and entered a decree in accordance with the Master's report, and it is from this decree that the appeal is prosecuted.

The questions of law involved in this case are not in dispute. It is merely a question of fact, and most of which are not in dispute. It is agreed by both parties that they had been married some, for several years, and the quality of the ways became intolerable. The parties had three daughters, which in good faith, had tried to bring about a reconciliation between their parents, but had failed, and the parents finally parted.

The trial court has found that the wife was living separate and apart without fault on her part, and that the defendant, the husband,

had not in good faith attempted a reconciliation. We have read the evidence of the husband and wife, and it is our conclusion that the Court properly found that the plaintiff was living separate and apart from the defendant without fault on her part, therefore the decree of the trial court should be affirmed.

Affirmed.

had not in good faith attempted a reconciliation. We have read the evidence of the husband and wife, and it is our conclusion that the Court properly found that the plaintiff was living separate and apart from the defendant without fault on her part, therefore the decree of the trial court should be affirmed.

Affirmed.

41763

317 I.A. 374

JOSEPH FARNETTI,
Appellee,

v.

FRANCESCA MANGANO, DOMINIC MANGANO, RALPH J. SALERNO, individually, and RALPH J. SALERNO, doing business as ROSARIO D. SALERNO SONS.

ON APPEAL OF RALPH J. SALERNO, individually and RALPH J. SALERNO, doing business as ROSARIO D. SALERNO SONS,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

124

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $1,094.09 rendered in favor of plaintiff, Joseph Farnetti, and against defendants, Francesca Mangano, Dominic Mangano, and Ralph J. Salerno, individually, and Ralph J. Salerno, doing business as Rosario D. Salerno Sons, on a promissory note in the principal sum of $1,000. The judgment included the principal of said note plus $94.09 accrued interest. The case was tried by the court without a jury. The makers of the note, Francesca Mangano and Dominic Mangano, have not joined in this appeal.

Plaintiff's statement of claim alleged his acquisition of the note, his demand on the makers to pay same, their refusal to pay and due notice of protest. The note was attached to and made a part of plaintiff's statement of claim.

Apparently because of the fact that Ralph J. Salerno indorsed the note both individually and as Ralph J. Salerno, doing business as Rosario D. Salerno Sons, he was named as a defendant under both designations. Hereinafter for convenience he will be sometimes referred to merely as Salerno. The affidavit of merits and defense of Ralph J. Salerno individually and Ralph J. Salerno, doing business as Rosario D. Salerno Sons admits the execution of the note, the placing of Salerno's signatures on the reverse side

JOSEPH PARRETTI,
appellee,

v.

FRANCESCO MANGANO, DOMINIC MANGANO, RALPH J. SALERNO, individually, and RALPH J. SALERNO, doing business as ROSARIO D. SALERNO SONS,

appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for $1,094.09 rendered in favor of plaintiff, Joseph Parretti, and against defendants, Francesco Mangano, Dominic Mangano, and Ralph J. Salerno, individually, and Ralph J. Salerno, doing business as Rosario D. Salerno Sons, on a promissory note in the principal sum of $1,000. The judgment included the principal of said note plus $94.09 accrued interest. The case was tried by the court without a jury. The makers of the note, Francesco Mangano and Dominic Mangano, have not joined in this appeal.

Plaintiff's statement of claim alleged his acquisition of the note, his demand on the makers to pay same, their refusal to pay and due notice of protest. The note was attached to and made a part of plaintiff's statement of claim.

Apparently because of the fact that Ralph J. Salerno indorsed the note both individually and as Ralph J. Salerno, doing business as Rosario D. Salerno Sons, he was named as a defendant under both designations. Hereinafter for convenience he will be sometimes referred to merely as Salerno. The affidavit of merits and defense of Ralph J. Salerno individually and Ralph J. Salerno, doing business as Rosario D. Salerno Sons admits the execution of the note, the placing of Salerno's signatures on the reverse side

thereof and his delivery of said note to one Robert J. Spahr. It then alleges that Salerno had no knowledge that the note was indorsed and delivered to plaintiff in due course of business, that "said note by its terms became due on demand," that demand for payment was made on the makers, Francesca Mangano and Dominic Mangano, on July 22, 1940 and "payment refused by them," and that "said note was duly protested for nonpayment and notice thereof sent to said endorsers."

The affidavit of merits and defense also alleged that "an examination of the note in question discloses that on the reverse side thereof, there appears a printed form wherein and whereby the endorser of the said note unconditionally guarantees payment of the said note together with other provisions, but alleges that the said printed matter on the reverse side of the said note bears a large ink cross, thereby eliminating the guarantee provision contained in said printing and that in addition to the said large ink cross through the said printed material, there is written across the said printed material the words 'without recourse'; wherefore this defendant alleges that the specific printed provision of guarantee by the endorser having been eliminated by the ink cross in question, there is left only the legal effect of the signatures of this defendant on the reverse side of the same note; that ordinarily the legal effect of such signatures would be to provide, by implication of law, the endorsement of the note on the reverse side; that by reason of this defendant having written the said words 'without recourse' in the place where the same appears on the reverse side of the said note, the legal effect of the signing of the said note by this defendant is that the signing of this defendant's name did not then become an endorsement of the said note but that such signing merely operated to transfer title and to guarantee the validity of the signature of the makers of the said note." The affidavit of merits and defense admitted that Salerno failed and refused to pay

thereof and his delivery of said note to one Robert A. Spahr. It then alleges that Salerno had no knowledge that the note was indorsed and delivered to plaintiff in due course of business, that "said note by its terms became due on demand," that demand for payment was made on the makers, Francesco Morgano and Domitie Morgano, on July 22, 1940 and "payment refused by them," and that "said note was duly protested for nonpayment and notice thereof sent to said endorsers."

The affidavit of merits and defense also alleged that "an examination of the note in question discloses that on the reverse side thereof, there appears a printed form wherein and whereby the endorser of the said note unconditionally guarantees payment of the said note together with other provisions, but alleges that the said printed matter on the reverse side of the said note bears a large ink cross, thereby eliminating the guarantee provision contained in said printing and that in addition to the said large ink cross through the said printed material, there is written across the said printed material the words 'without recourse'; wherefore this defendant alleges that the specific printed provision of guarantee by the endorser having been eliminated by the ink cross in question, there is left only the legal effect of the signatures of this defendant on the reverse side of the same note; that ordinarily the legal effect of such signatures would be to provide, by implication of law, the endorsement of the note on the reverse side; that by reason of this defendant having written the said words 'without recourse' in the place where the same appears on the reverse side of the said note, the legal effect of the signing of the said note by this defendant is that the signing of this defendant's name did not then become an endorsement of the said note but that such signing merely operated to transfer title and to guarantee the validity of the signature of the maker of the said note." The affidavit of merits and defense admitted that Salerno failed and refused to pay

said note and the accrued interest thereon.

The record discloses that plaintiff purchased the demand note involved in this controversy from Robert J. Spahr. Francesca Mangano and Dominic Mangano were the makers of the note. The payee named therein was Ralph Salerno who indorsed the note in blank as "Ralph J. Salerno" and also indorsed same as "Rosario D. Salerno Sons By Ralph J. Salerno, Owner" to Robert J. Spahr, who in turn sold and indorsed the note to plaintiff. On the line near the top of the reverse side of the note Salerno attached his signature "Ralph J. Salerno" as indorser. About an inch and one-eighth below the line on which said signature appears there is a heavy black line. Commencing five-eighths of an inch below said heavy black line is a printed form of guaranty three and one-quarter inches in length. Written in ink across this printed form and just above the center thereof are the words "Without Recourse." There is also a large ink cross which extends through almost the entire portion of the printed form of guaranty and which also apparently extends through the words "Without Recourse." It was below the printed form of guaranty, across which the words "Without Recourse" were written, that Salerno attached his signature under the designation, "Rosario D. Salerno Sons by Ralph J. Salerno Owner." Immediately below Salerno's signature as last above indicated is an ink line and then follows Robert J. Spahr's indorsement of the note.

Plaintiff testified that he purchased the note from Spahr, that nothing had been paid on same, that proper demand had been made for payment, that same was refused and that notice of protest had been served on the indorsers. The note, after having been identified, was received in evidence. No evidence was offered by Salerno.

Upon the trial of this case, in his endeavor to clarify and narrow the issues, the trial judge interrogated Salerno's counsel as follows:

"The Court: *** However, the only point made in the defense is that it is a special endorsement, is that right?

said note and the secured interest thereon.

The record discloses that plaintiff purchased the demand note involved in this controversy from Robert J. Spain. Francesco Mangano and Dominic Mangano were the makers of the note. The payee named therein was Ralph Salerno who indorsed the note in blank as "Ralph J. Salerno" and also indorsed same as "Rosario D. Salerno Sons by Ralph J. Salerno, Owner" to Robert J. Spain, who in turn paid and indorsed the note to plaintiff. In the line near the top of the reverse side of the note Salerno attached his signature "Ralph J. Salerno" as indorser. About an inch and one-eighth below the line on which said signature appears there is a heavy black line. Commencing five-eighths of an inch below said heavy black line is a printed form of twenty three and one-quarter inches in length. Written in ink across this printed form and just above the center thereof are the words "Without Recourse." There is also a large ink cross which extends through almost the entire portion of the printed form of twenty and which also apparently extends through the words "Without Recourse." It was below the printed form of twenty, across which the words "Without Recourse" were written, that Salerno attached his signature under the designation, "Rosario D. Salerno Sons by Ralph J. Salerno Owner." Immediately below Salerno's signature as last above indicated is an ink line and then follows Robert J. Spain's indorsement of the note.

Plaintiff testified that he purchased the note from Spain, that nothing had been paid on same, that proper demand had been made for payment, that same was refused and that notice of protest had been served on the indorsers. The note, after having been identified, was received in evidence. No evidence was offered by Salerno.

Upon the trial of this case, in his endeavor to clarify and narrow the issues, the trial judge interrogated Salerno's counsel as follows:

"The Court: -- However, the only point made in the defense is that it is a special endorsement, is that right?

"Mr. Plame: It is the chief point, if the Court please.

"The Court: The chief point - it is the only point, isn't that right?

"Mr. Plame: That is right."

In Salerno's brief his counsel criticises the conduct of the trial judge because of his interrogation of counsel as above indicated and argues that if there were triable issues presented, the trial judge "should have determined what they were" solely from the pleadings and that "it was improper and unfair to persist in an attempt to extract an oral admission from Ralph J. Salerno's counsel that the sole issue in the case was whether Salerno's endorsement was general or qualified." It is the duty of every court, whether trial court or reviewing court, to clarify and narrow the issues in a case, whenever it is possible to do so. We can conceive of no better way to ascertain what the real and material issues are than by eliciting such information from counsel who should be familiar with his case. Counsel having made the admission to the trial court that the sole issue in the case was whether Salerno's indorsement of the note was general or qualified, Salerno is bound by such admission.

Thus the only question we are called upon to determine is whether Salerno's indorsements of the note were general or limited or in other words whether they were made without qualification. There can be no question but that his indorsement appearing near the top of the reverse side of the note was general. As has been shown the words "Without Recourse" written as they were about three inches below Salerno's indorsement at the top of the reverse side of the note and separated therefrom by a heavy black line, which was an inch and one-eighth below said indorsement and extended entirely across the back of the note, could not possibly refer to or have any connection with Salerno's indorsement at the top of the reverse side of the note. Section 38 of the Negotiable Instruments act (para. 58, chap. 98, Ill. Rev. Stat. 1941), provides in part that a qualified indorsement "may be made by adding to the indorser's signature the words

"Mr. Plaza: It is the chief point, if the Court please.

"The Court: The chief point - it is the only point, isn't that right?

"Mr. Plaza: That is right."

In Salerno's brief his counsel criticizes the conduct of the trial judge because of his interrogation of counsel as above indicated and argues that if there were triable issues presented, the trial judge "should have determined what they were" solely from the pleadings and that "it was improper and unfair to persist in an attempt to extract an oral admission from Ralph J. Salerno's counsel that the sole issue in the case was whether Salerno's endorsement was general or qualified." It is the duty of every court, whether trial court or reviewing court, to clarify and narrow the issues in a case, whenever it is possible to do so. We can conceive of no better way to ascertain what the real and material issues are than by eliciting such information from counsel who should be familiar with his case. Counsel having made the admission to the trial court that the sole issue in the case was whether Salerno's indorsement of the note was general or qualified, Salerno is bound by such admission.

Thus the only question we are called upon to determine is whether Salerno's indorsements of the note were general or limited or in other words whether they were made without qualification. There can be no question but that his indorsement appearing near the top of the reverse side of the note was general. As has been shown the words "Without Recourse" written as they were about three inches below Salerno's indorsement at the top of the reverse side of the note and separated therefrom by a heavy black line, which was an inch and one-eighth below said indorsement and extended entirely across the back of the note, could not possibly refer to or have any connection with Salerno's indorsement at the top of the reverse side of the note. Section 38 of the Negotiable Instruments act (para. 38, chap. 98, III. Rev. Stat. 1941), provides in part that a qualified indorsement "may be made by adding to the indorser's signature the words

'without recourse' or any words of similar import." Since the words "Without Recourse" were written on the reverse side of the note in the manner indicated they could not possibly be considered as having been added to the indorser's signature near the top of the note.

Salerno's second indorsement under the designation "Rosario D. Salerno Sons by Ralph J. Salerno Owner" presents a somewhat different situation. As has been seen this indorsement was written below the printed form of guaranty, across the body of which were written the words "Without Recourse." It is agreed that the ink cross drawn through said printed form of guaranty eliminated the guaranty from the instrument. However, the trial court was unable to determine from an examination of the reverse side of the note whether the words "Without Recourse" were written over the ink cross and after said cross had been drawn through the printed form of guaranty or whether the ink cross was drawn through the printed form of guaranty and the words "Without Recourse" after those words were written across said printed form of guaranty. Neither are we able to determine this question from an examination of the note. While it was within the power of Salerno to present evidence to explain this ambiguity in the instrument and to show which was placed first on the reverse side of the note, the words "Without Recourse" or the ink cross, he did not see fit to do so. It has been repeatedly held that, where one of the parties to a law suit has it within his power to produce evidence material to the issue or issues involved therein and he fails to produce same, it will be presumed that if he had presented such evidence it would have been unfavorable to him.

We are impelled to hold as to the indorsement "Rosario D. Salerno Sons by Ralph J. Salerno Owner" that it has not been satisfactorily shown that same was made "Without Recourse." In any event the ambiguity as to the character of this indorsement was not explained upon the trial by Salerno who had it within his power to

'without recourse' or any words of similar import." Since the words "Without Recourse" were written on the reverse side of the note in the manner indicated they could not possibly be considered as having been added to the indorser's signature over the top of the note.

Salerno's second indorsement under the designation "Osario D. Salerno done by Ralph J. Salerno Owner" presents a somewhat different situation. As has been seen this indorsement was written below the printed form of guaranty, across the body of which were written the words "Without Recourse." It is agreed that the ink cross drawn through said printed form of guaranty eliminated the guaranty from the instrument. However, the trial court was unable to determine from an examination of the reverse side of the note whether the words "Without Recourse" were written over the ink cross and after said cross had been drawn through the printed form of guaranty or whether the ink cross was drawn through the printed form of guaranty and the words "Without Recourse" after those words were written across said printed form of guaranty. Neither are we able to determine this question from an examination of the note. While it was within the power of Salerno to present evidence to explain this ambiguity in the instrument and to show which was placed first on the reverse side of the note, the words "Without Recourse" or the ink cross, he did not see fit to do so. It has been repeatedly held that, where one of the parties to a law suit has it within his power to produce evidence material to the issue or issues involved therein and he fails to produce same, it will be presumed that if he had presented such evidence it would have been unfavorable to him.

We are impelled to hold as to the indorsement "Osario D. Salerno done by Ralph J. Salerno Owner" that it has not been satisfactorily shown that same was made "Without Recourse." In any event the ambiguity as to the character of this indorsement was not explained upon the trial by Salerno who had it within his power to

make such explanation. Since the first indorsement of Salerno near the top of the reverse side of the note was unqualified and since the second indorsement made by him must be considered either as unqualified or at the best ambiguous in so far as he is concerned, the trial court properly held that plaintiff was entitled to recover.

We have considered the other points urged but in the view we take of this case and for the reasons heretofore stated we deem further discussion unnecessary.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

make such explanation. Since the first indorsement of Lairmo near the top of the reverse side of the note was unqualified and since the second indorsement made by him must be considered either as unqualified or as the best endorsed in so far as he is concerned, the trial court properly held that plaintiff was entitled to recover.

We have considered the other points urged but in the view we take of this case and for the reasons hereinbefore stated we deem further discussion unnecessary.

The judgment of the municipal court of Toledo is affirmed.

JUDGMENT AFFIRMED.

Stahl and Keating, JJ., concur.

41811 317 I.A. 375

THE LICTORIO, INC., and LUIGI MARIANELLI,
Appellants,

v.

SEARS, ROEBUCK & CO., and SEARS INTERNATIONAL, INC., corporations,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by plaintiffs, The Lictorio, Inc., and Luigi Marianelli, seeks to reverse an order of the trial court which sustained the motion of defendants, Sears, Roebuck & Co., and Sears International, Inc., to strike plaintiffs' amended complaint and to dismiss the suit because said complaint did not state a cause of action. Plaintiffs did not seek to file any further amended complaint.

For a clearer understanding of the questions presented it is necessary to set forth in full those portions of plaintiffs' amended complaint upon which their claim is predicated.

They are as follows:

"1. THE LICTORIO, INC., is an Illinois corporation duly organized and existing under and by virtue of the laws of the State of Illinois; LUIGI MARIANELLI is a citizen and resident of Chicago, Cook County, Illinois.

"2. SEARS, ROEBUCK & CO. is a New York corporation, with its principal office and its principal place of business in Chicago, Cook County, Illinois; SEARS INTERNATIONAL, INC., is an Illinois corporation, with its principal place of business and office in Chicago, Cook County, Illinois.

"3. After extended negotiations, on or about April 26, 1938, Sears International, Inc. addressed to plaintiff Luigi Marianelli, a letter in the words and figures following, to-wit:

'Sears
International
3300 Arthington Street
Chicago U.S.A

THE LICTORIO, INC., and LUIGI MARIANELLI,
Appellants,

v.

SEARS, ROEBUCK & CO., and SEARS INTERNATIONAL, INC., corporations,
Appellees.

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For a clearer understanding of the questions presented it is necessary to set forth in full those portions of plaintiffs' amended complaint upon which their claim is predicated.

They are as follows:

"1. THE LICTORIO, INC., is an Illinois corporation duly organized and existing under and by virtue of the laws of the State of Illinois; LUIGI MARIANELLI is a citizen and resident of Chicago, Cook County, Illinois.

"2. SEARS, ROEBUCK & CO. is a New York corporation, with its principal office and its principal place of business in Chicago, Cook County, Illinois; SEARS INTERNATIONAL, INC., is an Illinois corporation, with its principal place of business and office in Chicago, Cook County, Illinois.

"3. After extended negotiations, on or about April 26, 1938, Sears International, Inc. addressed to plaintiff Luigi Marianelli, a letter in the words and figures following, to-wit:

'Sears
International
3300 Arthington Street
Chicago U.S.A

April 26, 1938

Mr. Luigi Marianelli
9924 S. State Street
Chicago, Illinois.

Dear Mr. Marianelli:

The following is an agreement concluded the first day of May, 1938, between you, Luigi Marianelli, and Sears International, Inc.

As the author of a project and scheme to develop more business between Sears International, Inc., and Italian Government Agencies, private persons or corporations of Italy, we confirm our understanding that you agree to go to Italy within sixty (60) days after May first, at your own expense, in order to contact and develop the business mentioned above.

Sears International, Inc. hereby agrees to appoint you as their temporary representative for Italy, its Colonies and Possessions, for a period of six (6) months from June 30, 1938, for the sale of their products according to the plan outlined in your project incorporating the exchange or part exchange of such merchandise of Sears International, Inc., which you may sell for goods furnished by Italian Government agencies, firms, or private persons with whom you may be dealing. It is to be expressly understood that any arrangements of the above nature which you may make are subject to written confirmation by this office.

In view of the fact that our present purchases of Italian goods are relatively small, it will be necessary for you to investigate thoroughly the Italian merchandise or raw material which, in your opinion, might be purchased by Sears International, Inc. or Sears, Roebuck & Co. in exchange for Sears International, Inc. goods, sold in Italy. This will involve the supplying by you of samples, prices, etc. It is understood that if a purchase of Italian goods, on the basis outlined above, is agreed upon, you shall cooperate closely with the buyers of Sears International, Inc. or Sears, Roebuck & Co. who may be appointed to handle these transactions. It is further understood that Sears International, Inc. makes no committments whatsoever regarding the purchase of Italian goods in question as the decision regarding such purchases will be made by the interested buyers or executives of Sears International, Inc. or Sears, Roebuck & Co.

Sears International, Inc. further agrees that if, after the expiration of the above mentioned trial period of six (6) months of your appointment as their temporary representative for Italy and the Italian Colonies and Possessions, you will have secured business acceptable to them of not less than $100,000, you will be appointed in the same capacity for an additional trial period of six (6) months in order to bring to a conclusion any business transactions which you may have started. If, during this additional trial period of six (6) months, the sales of Sears International merchandise made by you and accepted by us exceed $250,000, you shall be appointed permanent representative of Sears International for Italy, its Colonies and Possessions.

Following your appointment as permanent representative, after the expiration of the above mentioned trial periods of time, a six month's notice will be required by either you or Sears

April 26, 1938

Mr. Luigi Bertarelli
9214 S. State Street
Chicago, Illinois.

Dear Mr. Bertarelli:

The following is an agreement concluded the first day of May, 1938, between you, Luigi Bertarelli, and Sears International, Inc.

As the author of a project and scheme to develop more business between Sears International, Inc., and Italian Government agencies, private persons or corporations of Italy, we confirm our understanding that you agree to go to Italy within sixty (60) days after say first, at your own expense, in order to contact and develop the business mentioned above.

Sears International, Inc. hereby agrees to appoint you as their temporary representative for Italy, its Colonies and possessions, for a period of six (6) months from June 30, 1938, for the sale of their products according to the plan outlined in your project incorporating the exchange or part exchange of merchandise of Sears International, Inc., which you may sell for goods furnished by Italian Government agencies, firms, or private persons with whom you may be dealing. It is to be expressly understood that any arrangements of the above nature which you may make are subject to written confirmation by this office.

In view of the fact that our present purchases of Italian goods are relatively small, it will be necessary for you to investigate thoroughly the Italian manufactures or raw material which, in your opinion, might be purchased by Sears International, Inc. or Sears, Roebuck & Co. in exchange for Sears International, Inc. goods, said in Italy. This will involve the supplying by you of samples, prices, etc. It is understood that if a purchase of Italian goods, on the basis outlined above, is agreed upon, you shall cooperate closely with the buyers of Sears International, Inc. or Sears, Roebuck & Co. who may be appointed to handle these transactions. It is further understood that Sears International, Inc. makes no commitments whatsoever regarding the purchase of Italian goods in question as the decision regarding such purchases will be made by the interested buyers or executives of Sears International, Inc. or Sears, Roebuck & Co.

Sears International, Inc. further agrees that if, after the expiration of the above mentioned trial period of six (6) months of your appointment as their temporary representative for Italy and the Italian Colonies and Possessions, you will have secured business acceptable to them or not less than $100,000, you will be appointed in the same capacity for an additional trial period of six (6) months in order to bring to a conclusion any business transactions which you may have started. If, during this additional trial period of six (6) months, the sales of Sears International merchandise made by you and accepted by us exceed $250,000, you shall be appointed permanent representative of Sears International for Italy, its Colonies and Possessions.

Following your appointment as permanent representative, after the expiration of the above mentioned trial periods of time, a six month's notice will be required by either you or Sears

International, Inc. if it will be your or their desire to cancel the agreement in question.

While you have verbally agreed that you will not represent any other firm or corporation or interests in Italy or its Possessions other than Sears, International, it is understood that you may reserve the right to participate as stockholder, officer, manager or in any other capacity in any corporation or organization, or to promote schemes or projects for industrial, commercial, or financial enterprises in Italy and its Possessions. It is further understood that you reserve the right to form a corporation, presided over by you, in order to represent you and your interests with Sears International, Inc., and to further develop the business relations between Sears International and Italy or its Colonial Possessions.

While it is understood that all of your expenses are to be borne by you, Sears International agrees to pay you a commission amounting to 7-1/2% of net f.o.b. factory sales value of Sears International, Inc. merchandise sold through you to the Italian Government, firms, or private individuals in Italy, its Colonies or Possessions, with whom you may be dealing and accepted by Sears International. It is understood that a sale of such a nature is not to be considered completed until the merchandise is received in Italy and paid for. Such commission is to be paid to you at the expiration of the above mentioned two (2) six-month trial periods and at the end of each fiscal year thereafter, when and if you are appointed as permanent representative of Sears International, Inc. in the above mentioned territory. As such commissions will be accumulated on the books of Sears International, Inc. at the end of each month, Sears International, Inc. agrees to allow you to draw up to 50% the amount of such accumulated earned commissions.

This agreement is being submitted to you in duplicate; kindly sign and have witnessed the duplicate copy of this letter, on the line indicated below, and return for our files with the least possible delay.

Very truly yours,
SEARS INTERNATIONAL, INC.
(S) G. L. Artamonoff
President

ACCEPTED:
(S) LUIGI MARIANELLI
WITNESS:
(S) Gertrude F. Fricke'

"Said letter was accepted by plaintiff, Luigi Marianelli, as appears at the bottom thereof; the said Sears International, Inc. is a wholly owned subsidiary of Sears, Roebuck & Co., and said contract evidenced by said letter and said acceptance of April 26, 1938, was a contract for the benefit of Sears, Roebuck & Co., particularly for the sales of products of Sears, Roebuck & Co., defendant herein.

"* * *

International, Inc. if it will be your or their desire to cancel the agreement in question.

While you have verbally agreed that you will not represent any other firm or corporation or interests in Italy or its possessions other than Sears, International, it is understood that you may reserve the right to participate as a shareholder, officer, manager or in any other capacity in any corporation or organization, or to promote schemes or projects for industrial, commercial, or financial enterprises in Italy and its possessions. It is further understood that you reserve the right to form a corporation, provided over by you, in order to represent you and your interests with Sears International, Inc., and to further develop the business relations between Sears International and Italy or its colonial possessions.

While it is understood that all of your expenses are to be borne by you, Sears International agrees to pay you a commission amounting to 7-1/2% of net f.o.b. factory sales value of Sears International, Inc. merchandise sold through you to the Italian Government, firms, or private individuals in Italy, its Colonies or possessions, with who you may be dealing and accepted by Sears International. It is understood that a sale of such a nature is not to be considered completed until the merchandise is received in Italy and paid for. Such commission is to be paid to you at the expiration of the above mentioned two (2) six-month trial periods and at the end of each fiscal year thereafter, when and if you are appointed as permanent representative of Sears International, Inc. in the above mentioned territory. As such commissions will be accumulated on the books of Sears International, Inc. at the end of each month, Sears International, Inc. agrees to allow you to draw up to 50% the amount of such accumulated earned commissions.

This agreement is being submitted to you in duplicate; kindly sign and have witnessed the duplicate copy of this letter, on the line indicated below, and return for our files with the least possible delay.

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SEARS INTERNATIONAL, INC.
(S) G. L. Arzumanoff
President

ACCEPTED:
(S) LUIGI MARIANELLI
WITNESS:
(S) Gertrude F. Fricke

"Said letter was accepted by plaintiff, Luigi Marianelli, as appears at the bottom thereof; the said Sears International, Inc. is a wholly owned subsidiary of Sears, Roebuck & Co., and said contract evidenced by said letter and said acceptance of April 26, 1938, was a contract for the benefit of Sears, Roebuck & Co., particularly for the sales of products of Sears, Roebuck & Co., defendant herein.

* * *

"7. As provided by the letter of April 26, 1938 from Sears International, Inc, to Luigi Marianelli, there was formed the corporation, THE LICTORIO, INC., an Illinois corporation, of which plaintiff Luigi Marianelli was the President, a director and stockholder; the said THE LICTORIO, INC. advanced to plaintiff Marianelli his expenses, for the purpose of making a trip to Italy, as contemplated by said letter of April 26, 1938, but did not pay the said Marianelli, nor has anyone else paid the said Marianelli for his services in connection with his trip to Italy; that shortly following the said letter of April 26, 1938, and on or about July 12, 1938, the said Luigi Marianelli proceeded to Italy, in pursuance of the contract and plan adopted by the plaintiffs and defendants, and thereafter for approximately seven months pursued said plans in Italy with various officials of the Italian Government and its colonial enterprises; that said efforts of said Marianelli resulted in plaintiffs securing from the Italian Government a memorandum of Italian products which the Italian Government was willing to sell to Sears, Roebuck & Co., and a list of the products which the Italian Government was willing to buy from Sears, Roebuck & Co., in addition to the purchase of prefabricated houses, in accordance with plans and designs furnished in books supplied by the defendants to Marianelli and by him delivered to the officials of the Italian Government; that said Italian products were to be paid for by Sears, Roebuck & Co. from funds deposited in banks of the Kingdom of Italy to its account in payment for the products sold to the Italian Government, and particularly to its Italian Colonies in Italian East Africa, by Sears, Roebuck & Co.

"8. After the conclusion of the negotiations of the plaintiffs with the Italian Government and its various agencies and representatives, the said Luigi Marianelli returned to the United States and reported to the Vice President and President of Sears International, Inc., the result of his efforts; that on this and

"7. As provided by the letter of April 26, 1938 from Sears International, Inc., to Luigi Marianelli, there was formed the corporation, THE LICTONIO, INC., an Illinois corporation, of which plaintiff Luigi Marianelli was the President, a director and stockholder; the said THE LICTONIO, INC. advanced to plaintiff Marianelli his expenses, for the purpose of making a trip to Italy, as contemplated by said letter of April 26, 1938, but did not pay the said Marianelli, nor has anyone else paid the said Marianelli for his services in connection with his trip to Italy; that shortly following the said letter of April 26, 1938, and on or about July 12, 1938, the said Luigi Marianelli proceeded to Italy, in pursuance of the contract and plan adopted by the plaintiffs and defendants, and thereafter for approximately seven months pursued said plans in Italy with various officials of the Italian Government and its colonial enterprises; that said efforts of said Marianelli resulted in plaintiffs securing from the Italian Government a memorandum of Italian products which the Italian Government was willing to sell to Sears, Roebuck & Co., and a list of the products which the Italian Government was willing to buy from Sears, Roebuck & Co., in addition to the purchase of prefabricated houses, in accordance with plans and designs furnished in books supplied by the defendants to Marianelli and by him delivered to the officials of the Italian Government; that said Italian products were to be paid for by Sears, Roebuck & Co. from funds deposited in banks of the Kingdom of Italy to its account in payment for the products sold to the Italian Government, and particularly to its Italian Colonies in Italian East Africa, by Sears, Roebuck & Co.

"8. After the conclusion of the negotiations of the plaintiffs with the Italian Government and its various agencies and representatives, the said Luigi Marianelli returned to the United States and reported to the Vice President and President of Sears International, Inc., the result of his efforts; that on this and

other occasions the said Vice President and President of defendant, Sears International, Inc., expressed themselves as well pleased with the success of his endeavors and stated to the said Marianelli that they had no doubt the plans which had been accomplished by the said Marianelli in Italy would be carried forward by the defendants herein, but that it would be advisable to submit same to one Donald Nelson, a Vice President of defendant, Sears, Roebuck & Co., who was then out of the City of Chicago. Thereafter plaintiffs received a letter from the defendants, copy of which is attached hereto and made a part hereof, marked Plaintiffs' Exhibit 4; that said Vice President and President of defendant, Sears International, Inc., asked the plaintiffs to submit written reports and proposals with reference to the services which had been performed by the plaintiffs in Italy, all of which the plaintiffs proceeded to do.

"9. Thereafter plaintiffs were informed by the President of defendant, Sears International, Inc., that the report of plaintiffs had been submitted to Vice President Nelson of Sears, Roebuck & Co. and that he in turn had submitted the report of plaintiffs to General Wood, the chairman of the board of directors of Sears, Roebuck & Co.

"10. That with the consent and permission of the defendants, one of the stockholders and officials of The Lictorio, Inc., was an employee of defendants, and that when plaintiffs reported to the Vice President of Sears International, Inc., Mr. Kearney (on or about March 6, 1939), the successful termination of the plaintiff's negotiations, the said stockholder and official of the plaintiff corporation, then asked the said Kearney whether or not it was necessary to renew or proceed with the signing of a new agreement with The Lictorio, Inc., or the said Marianelli, or if he, the said Kearney, still considered effective the one signed between Sears and Marianelli, dated April 26, 1938; that the said Vice President Kearney, of Sears International, Inc., stated that inasmuch as the said Marianelli had succeeded in bringing to such a successful con-

other occasions the said Vice President and President of defendant, Sears International, Inc., expressed themselves as well pleased with the success of his endeavors and stated to the said Martinelli that they had no doubt the plans which had been accomplished by the said Martinelli in Italy would be carried forward by the defendants herein, but that it would be advisable to submit same to one Donald Nelson, a Vice President of defendant, Sears, Roebuck & Co., who was then out of the City of Chicago. Thereafter plaintiffs received a letter from the defendants, copy of which is attached hereto and made a part hereof, marked Plaintiffs' Exhibit 4; that said Vice President and President of defendant, Sears International, Inc., asked the plaintiffs to submit written reports and proposals with reference to the services which had been performed by the plaintiffs in Italy, all of which the plaintiffs proceeded to do.

"9. Thereafter plaintiffs were informed by the President of defendant, Sears International, Inc., that the report of plaintiffs had been submitted to Vice President Nelson of Sears, Roebuck & Co. and that he in turn had submitted the report of plaintiffs to General Wood, the chairman of the board of directors of Sears, Roebuck & Co.

"10. That with the consent and permission of the defendants, one of the stockholders and officials of The Victorio, Inc., was an employee of defendants, and that when plaintiffs reported to the Vice President of Sears International, Inc., Mr. Kearney (on or about March 6, 1939), the successful termination of the plaintiff's negotiations, the said stockholder and official of the plaintiff corporation, then asked the said Kearney whether or not it was necessary to renew or proceed with the signing of a new agreement with The Victorio, Inc., or the said Martinelli, or if he, the said Kearney, still considered effective the one signed between Sears and Martinelli, dated April 26, 1938; that the said Vice President Kearney, of Sears International, Inc., stated that inasmuch as the said Martinelli had succeeded in bringing to such a successful con-

clusion the negotiations for an amount which was so much above what they had asked of the said Marianelli, that the plaintiffs had the right to another six months' time for the purpose of bringing to a conclusion the negotiations with the Italian Government; that consequently it was not necessary to make out another contract.

"11. That during the negotiations between the plaintiffs and the Italian Government, its officials and representatives, all of which was reported by the plaintiffs to the defendants, it was agreed that the amount of goods which would be interchanged or exchanged between the said Italian Government, its colonial possessions and industries, and defendants, would be at least $15,000,000 during a two-year period; that upon said amount of money, the plaintiffs would be entitled to a commission of 7-1/2% by virtue of said letter of April 26, 1938, hereinbefore alleged.

"12. That the plaintiffs performed all of the obligations and agreements assumed by the plaintiffs; that the defendants accepted the services of the plaintiffs, and the expenditures made by the plaintiffs on behalf of the defendants, without any objections, with full knowledge thereof, and expressed approval thereof.

"13. On or about May 11, 1939, the plaintiffs received from the defendants a letter as follows:

'Chicago, May 11, 1939.

Mr. Luigi Marianelli
The Lictorio
201 N. Wells St.
Chicago, Ill.

Dear Marianelli:

I am sorry to state that the executives of Sears, Roebuck & Co. have decided against the consideration of your proposal at the present time, for various reasons which I can probably better explain personally than in writing.

I regret exceedingly the trouble to which you have gone,

cisation the negotiations for an amount which was so much above what they had asked of the said Marianelli, that the plaintiffs had the right to another six months' time for the purpose of bringing to a conclusion the negotiations with the Italian Government; that consequently it was not necessary to make out another contract.

"11. That during the negotiations between the plaintiffs and the Italian Government, its officials and representatives, all of which was reported by the plaintiffs to the defendants, it was agreed that the amount of goods which would be interchanged or exchanged between the said Italian Government, its colonial possessions and industries, and defendants, would be at least $15,000,000 during a two-year period; that upon said amount of money, the plaintiffs would be entitled to a commission of 7-1/2% by virtue of said letter of April 26, 1939, hereinbefore alleged.

"12. That the plaintiffs performed all of the obligations and agreements assumed by the plaintiffs; that the defendants accepted the services of the plaintiffs, and the expenditures made by the plaintiffs on behalf of the defendants, without any objections, with full knowledge thereof, and expressed approval thereof.

"13. On or about May 11, 1939, the plaintiffs received from the defendants a letter as follows:

'Chicago, May 11, 1939.

Mr. Emil Marianelli
The Niagara
201 N. Wells St.
Chicago, Ill.

Dear Marianelli:

I am sorry to state that the executives of Sears, Roebuck & Co. have decided against the consideration of your proposal at the present time, for various reasons which I can probably better explain personally than in writing.

I regret sincerely the trouble to which you have gone,

but under the circumstances there is nothing we can do.

Very truly yours,
G. L. Artamanoff
President."

"14. Thereafter the plaintiff, Marianelli, talked with the said Artamanoff and was informed that the chairman of the board of directors of the defendant Sears, Roebuck & Co., General Wood, had decided that the Jews in the United States were going to conduct a boycott of Italian goods because of the adverse action taken by the Italian Government toward Jews in Italy, also that there would be a World War and that these were the reasons why the defendants had decided to discontinue consideration of the plaintiffs' contract with the defendants.

"15. From the foregoing facts, the plaintiffs claim damages in the alternative, as follows:

"1. For the reasonable value of the services of Luigi Marianelli and The Lictorio, Inc., in connection with negotiations with the Italian Government, its representatives and industrial co-operatives, the sum of $100,000, and, for the expenses of the plaintiffs in connection with negotiations with the Italian Government, its representatives and industrial cooperatives, together with its reasonable office and other expenses, the sum of $30,000.

"2. A commission of 7-1/2% upon $25,000,000 ($12,500,000 of exports to Italy by Sears and an equivalent sum of imports from Italy by defendant), of goods, wares and merchandise which were agreed to be exchanged between the Italian Government, its official representatives and cooperatives, and the defendants, being the fair and reasonable as well as customary compensation for such services as the plaintiffs performed for the defendants, amounting to the sum of $937,500.

"3. To the contract compensation of 7-1/2% upon sales contracted to be made by the plaintiffs for the benefit of the defend-

but under the circumstances there is nothing we can do.

Very truly yours,
G. L. Artamonoff
President."

"14. Thereafter the plaintiff, Martinelli, talked with the said Artamonoff and was informed that the chairman of the board of directors of the defendant Sears, Roebuck & Co., General Wood, had decided that the Jews in the United States were going to conduct a boycott of Italian goods because of the adverse action taken by the Italian Government toward Jews in Italy, also that there would be a World War and that these were the reasons why the defendants had decided to discontinue consideration of the plaintiff's contract with the defendants.

"15. From the foregoing facts, the plaintiffs claim damages in the alternative, as follows:

"1. For the reasonable value of the services of Luigi Martinelli and The Victorio, Inc., in connection with negotiations with the Italian Government, its representatives and industrial co-operatives, the sum of $100,000, and, for the expenses of the plaintiffs in connection with negotiations with the Italian Government, its representatives and industrial cooperatives, together with its reasonable office and other expenses, the sum of $30,000.

"2. A commission of 7-1/2% upon $25,000,000 ($12,500,000 of exports to Italy by Sears and an equivalent sum of imports from Italy by defendant), of goods, wares and merchandise which were agreed to be exchanged between the Italian Government, its official representatives and cooperatives, and the defendants, being the fair and reasonable as well as customary compensation for such services as the plaintiffs performed for the defendants, amounting to the sum of $937,500.

"3. To the contract compensation of 7-1/2% upon sales contracted to be made by the plaintiffs for the benefit of the defend-

ants, amounting to the sum of $12,500,000 to the Italian Government, its official representatives and cooperatives, $937,500."

By reference in the amended complaint the following among other exhibits were attached to and made a part of same:

"PLAINTIFFS' EXHIBIT 3.

Memorandum

The goods which the firm Sears, Roebuck & Co. of Chicago should consider the object of exchange between Italy and the United States would have to be in the main as follows:

Sold to the Italian Market:

Oil of Cocoa and Palm
Vegetable and animal lard and fat
Molasses (up to a maximum of 4 million lire)
Paraffin (up to a maximum of 15 million lire)
Colophone (up to a maximum of 2 million lire)
Scrap iron and steel
Scrap tin and its alloys
Steel in bars, in blooms and billets
Steel pressed in sheets
Copper and its alloys, in bars and scrap
Mineral oils, raw
Cotton
Raw hides
Machine tools (with the express right to indicate the types of machines and the producers of the same)

Sale of Italian products to the U. S. market (chiefly in the zones of the Middle West and Far West).

Appetizers
Wines and liquors
Sweets
Twines, strings and ropes of flax, linen and ramie
Embroidered textiles, embroideries and laces in linen, flax, etc.
Carpets of all kinds (in flax, jute, wool, Borra of wool)
Textiles of all kinds (including those for tapestries, furnishings and sacred vestments)
Trimmings and ribbons of silk
Linen, also embroidered; personal, sheets and of rayon
Ties, shawls and scarfs of silk and rayon
Hose in silk and rayon
Cotton gloves
Leather gloves
Buttons of bone and Dum palm
Finished hats in woolen felt
Finished hats in straw
Worked marbles and alabasters
Decorated majolicas, for table and furnishing
Writing machines
Instruments and apparatus for surgery, orthopedics, medicine, etc.
Works in blown glass, pressed, cut, stamped, incised (decorative objects, Murano Lamps, Chandeliers).
Pharmaceutical and medicinal preparations

ants, amounting to the sum of $12,500,000 to the Italian Government, its official representatives and cooperatives, $927,500."

By reference in the amended complaint the following among other exhibits were attached to and made a part of same:

"PLAINTIFFS' EXHIBIT 3.

Memorandum

The goods which the firm Sears, Roebuck & Co. of Chicago should consider the object of exchange between Italy and the United States would have to be in the main as follows:

Sold to the Italian Market:

Oil of Cocoa and Palm
Vegetable and animal lard and fat
Molasses (up to a maximum of 4 million lire)
Paraffin (up to a maximum of 15 million lire)
Colophone (up to a maximum of 2 million lire)
Scrap iron and steel
Scrap tin and its alloys
Steel in bars, in blooms and billets
Steel pressed in sheets
Copper and its alloys, in bars and scrap
Mineral oils, raw
Cotton
Raw hides
Machine tools (with the express right to indicate the types of machines and the producers of the same)

Sale of Italian products to the U. S. market (chiefly in the zones of the Middle West and Far West).

Appetizers
Wines and liquors
Sweets
Twines, strings and ropes of flax, linen and ramie
Embroidered textiles, embroideries and laces in linen, flax, etc.
Carpets of all kinds (in flax, jute, wool, Boura of wool)
Textiles of all kinds (including those for tapestries, furnishings and sacred vestments)
Trimmings and ribbons of silk
Linen, also embroidered; personal, sheets and of rayon
Ties, shawls and scarfs of silk and rayon
Hose in silk and rayon
Cotton gloves
Leather gloves
Buttons of bone and Dum palm
Finished hats in woolen felt
Finished hats in straw
Worked marbles and alabasters
Decorated majolicas, for table and furnishing
Writing machines
Instruments and apparatus for surgery, orthopedics, medicine, etc.
Works in blown glass, pressed, cut, stamped, incised (decorative objects, Murano lamps, Chandeliers).
Pharmaceutical and medicinal preparations

Perfumes and toilette articles of all kinds
Leather work (purses, pocket books, desk sets,etc.)
Shoes and slippers
Sport articles and suits
Arts and craft products not included under the mentioned headings
Harmonicas

For the following products of importation there could be consented to Sears, Roebuck & Co. a slight premium on the prices as at paragraph 4 of the appended letter:

Oil of Cocoa
Vegetable and animal lard and fat
Paraffin
Colophone
Scrap iron and steel
Scrap zinc and its alloys

Both the above lists have an indicative value and in the meantime we reserve the right to add changes in the future."

"PLAINTIFFS' EXHIBIT 4.

SEARS INTERNATIONAL, INC.

May 5th, 1939.

Mr. Luigi Marianelli
The Lictorio
201 North Wells St.
Chicago, Ill.

Dear Mr. Marianelli,

I have your letter of May fourth. The question of the barter deal with Italy has been discussed with Mr. D. M. Nelson and a full report has been sent to Gen. Wood who happens to be in Washington at the present time, for his comments and suggestions.

I will communicate with you just as soon as I hear from the General.

Best regards,

Very truly yours,
(S) L. G. Artamanoff
President

"PLAINTIFFS' EXHIBIT 5.

Chicago, April 24, 1939

Sears International Inc.,
3400 W. Arthington Street,
Chicago, Illinois.

Sirs:

As I have explained many other times (and as was also suggested by Comm. Dr. Ballerina, Royal Counselor to the Italian Ambassador in Washington) it is necessary that Sears give a prompt reply to the Italian Government regarding the plan of exchange that we proposed. Any delay would jeopardize our position and the various Government officials interested in the project would, in due time,

Perfumes and toilette articles of all kinds
Leather work (purses, pocket books, desk sets, etc.)
Shoes and slippers
Sport articles and suits
Arts and craft products not included under the mentioned headings
Harmonicas

For the following products of importation there could be consented to Sears, Roebuck & Co. a slight premium on the prices as at paragraph 4 of the appended letter:

Oil of Cocoa
Vegetable and animal lard and fat
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Best regards,

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President

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Chicago, April 24, 1939

Sears International Inc.,
3400 W. Washington Street,
Chicago, Illinois.

Sirs:

As I have mentioned many other times (and as was also suggested by Comm. Dr. Malfatti, Royal Commissioner to the Italian Ambassador in Washington) it is necessary that Sears give a prompt reply to the Italian Government regarding the plan of exchange that we proposed. Any delay would jeopardize our position and the various Government officials interested in the project would, in due time,

lose interest in the matter. Moreover, due to the fact that all foreign trade is handled through Mr. Guarneri, Minister of Exchanges and Currencies, who has taken an active interest in the project, I am convinced that any ulterior delay will be harmful to us.

The Italian Government has manifested, through Mr. Guarneri, her desire to increase the trade with the United States. The same department - Exchanges and Currencies - has given to the Colonial Ministry its consent for the acquisition of products such as houses, agricultural implements and machinery, etc., from Sears.

Mussolini himself gave his approval to the project for East Africa.

Moreover, the 'Colonial Works Administration' has approved the types of buildings proposed by us. (We are only awaiting the reply from the various provincial Governments of the Italian Colonies who are to specify their immediate requirements).

THE PROPOSALS AND CONDITIONS OF THE ITALIAN GOVERNMENT:

a) For Sears products - to be purchased by the Colonial Department - no overprices will be paid.

b) For machinery manufactured by other American firms, the Italian Government is ready and willing to give the permit of importation. (The manufacturing firms must pay Sears a commission).

c) For raw products, a premium of 10% to 15% above the market prices will be paid by the importers (Government or private companies authorized by the Department of Exchanges).

d) The minimum amount of business between Sears and Italy during a period of two years should be at least $15,000,000 ($7,500,000 in exports to Italy and an equivalent sum of acquisitions by Sears). If Sears finds the proposals to be advantageous, the Italian Government is disposed to increase the business even to $25,000,000 for the same period. From calculations made, Sears will realize a profit of 20% to 25%. On the basis of your declarations, the profit realized would be to your satisfaction.

THE COUNTER PROPOSALS THAT SEARS SHOULD MAKE AND THE GUARANTEES THAT SHOULD BE REQUESTED.

Now, Sears should request the Italian Government to undertake to acquire, of the total amount of merchandise to be furnished:

a) A minimum of 25% in Sears products;

b) to assure the importation of at least 10% of American made machinery above the present quota of importation from the United States;

c) to guarantee a payment of an average of 14% more than the market prices for the furnishing of raw products;

d) Sears reserve the right, if there should be an increase in the cost of the Italian manufactured products, to ask a corresponding increase in the premium accorded to her in the furnishing of raw material;

e) the guarantee, in case of hostilities in Europe, that

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c) For raw products, a premium of 10% to 15% above the market prices will be paid by the importers (Government or private companies authorized by the Department of Exchanges).

d) The minimum amount of business between Sears and Italy during a period of two years should be at least $1,000,000 ($7,500,000 in exports to Italy and an equivalent sum of equalizations by Sears). If Sears finds the proposals to be advantageous, the Italian Government is disposed to increase the business even to $25,000,000 for the same period. From calculations made, Sears will realize a profit of 20% to 25%. On the basis of your declarations, the profit realized would be to your satisfaction.

THE COUNTER PROPOSALS THAT SEARS SHOULD MAKE AND THE GUARANTEES THAT SHOULD BE FURNISHED.

"We", Sears should request the Italian Government to undertake to acquire, of the total amount of merchandise to be furnished:

a) A minimum of 25% in Sears products;

b) to assure the importation of at least 10% of American made machinery above the present quota of importation from the United States;

c) to guarantee a payment of an average of 14% more than the market prices for the furnishing of raw products;

d) Sears reserve the right, if there should be an increase in the cost of the Italian manufactured products, to make a corresponding increase in the premium accorded to her in the furnishing of raw material;

e) the guarantee, in case of hostilities in Europe, that

the payment for merchandise in transit to Italy of the money deposited in Italy in Sears' name shall be refunded in dollars by one of the Italian banks established in the United States;

f) the right to Sears to break the contract of Exchange in case of hostilities in Europe

g) to allow Sears to import from Italy (of the total amount involved) from 10% to 15% in wines and foodstuffs; from 20% to 25% in semi-manufactured products and the balance in manufactured products;

h) the right to establish the amount of imports when she has been assured that the prices of the Italian goods are favorable. (Part of the semi-manufactured products, as you said, could be disposed of to a third party or partly used in the manufacture of goods in the Sears establishments. Wines and foodstuffs could be sold to Hillman's or other firms engaged in the same business. Also a part of the products (such as clothing material, textile goods, woven tapestries, etc.) could be disposed of to the 6000 or more firms which sell Sears hundreds of millions in merchandise a year. Firms like Sears who previously acquired millions in merchandise from Japan, Germany and Checko Slovakia.

On her part Sears should assure the Italian Government that the merchandise purchased and to be sold in America will constitute an increase in Italian exportations, that is, that she would replace the merchandise previously purchased from the above mentioned countries.

THE ADVANTAGES THAT SEARS WOULD DERIVE:

a) Sears International could sell several more millions of dollars in merchandise and in this way improve her foreign trade, (while her imports would not be increased).

b) In dealing through the Ministry of Exchanges, Sears will be in a position to obtain facilitations which no other foreign or American concern will be able to obtain.

c) It will be possible - through this medium of exchange and due to the fact that all permits for importations are issued by the above mentioned department - to replace gradually the General Electric, Westinghouse, Frigidaire and other American firms in the export to Italy and its Colonies, of household products and farming machinery.

d) The possibility of selling 'For Cash Dollars' millions in products, such as lumber, cotton, oil, metals, etc., to Italian companies who at present are acquiring these products in the United States from firms who are not in a position to help the Italian industries to place their manufactured products in the American market as Sears could. (The exportation of Sears products, due to their quality and guarantee, will naturally increase with the development of Italian Oriental Africa and also when they have been tried).

HOW THE PROJECT COULD BE EFFECTED:

a) Returning to Rome (where now, following my activities and propaganda, the importance of Sears, Roebuck & Co. is well known and appreciated) I will see to it that the Ministry for Exchanges accepts and approves the counterproposals (contained in paragraphs a, b, c, d, e, f, g, h) made by Sears.

the payment for merchandise in transit to Italy of the money deposited in Italy in Sears' name shall be refunded in dollars by one of the Italian banks established in the United States;

f) the right to Sears to break the contract of exchange in case of hostilities in Europe

g) to allow Sears to import from Italy (of the total amount involved) from 10% to 15% in wines and foodstuffs; from 20% to 25% in semi-manufactured products and the balance in manufactured products;

h) the right to establish the amount of imports when she has been assured that the prices of the Italian goods are favorable. (Part of the semi-manufactured products, as you said, could be disposed of to a third party or partly used in the manufacture of goods in the Sears establishments. Wines and foodstuffs could be sold to Hillman's or other firms engaged in the same business. Also a part of the products (such as clothing material, textile goods, woven tapestries, etc.) could be disposed of to the 6000 or more firms which sell Sears hundreds of millions in merchandise a year. Firms like Sears who previously acquired millions in merchandise from Japan, Germany and Czecho Slovakia.

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a) Returning to Rome (where now, following my activities and propaganda, the importance of Sears, Roebuck & Co. is well known and appreciated) I will see to it that the ministry for Exchanges accepts and approves the counterproposals (contained in paragraphs a, b, c, d, e, f, g, h) made by Sears.

b) I would immediately open an office through which I could acquire data concerning the Italian industrial production, collect samples of products that Sears would require and their relative prices and forwarding same to Sears International.

c) Contemporary to my work in Italy, Sears, in collaboration with the Chicago office of the Lictorio Company, would send a questionnaire, enclosing illustrative material of the Italian Industrial products, to all the buyers and managers of 500 stores and to the managers of the establishments of the Company, to the importers with whom Sears does business, business firms, etc., of products that Italy could furnish and to the American industrialists from whom Sears acquires merchandise such as clothing, undergarments, furniture, etc., asking what would interest them and approximately what would be the quantity of Italian products they could purchase through Sears, providing the prices are favorable. As soon as the samples, prices and information as above stated have been collected, it will be possible to immediately start selling. A display (in Chicago, New York and other cities) organized by Sears with the co-operation of the 'Lictorio Company', and to which would be invited representatives of firms who might be interested in the acquisition of Italian products, could bring very good results and accelerate our sales.

d) As soon as the possibility of disposing, directly or through third parties, of the merchandise that Sears would buy in Italy, has been made, The Lictorio Company (if delegated by Sears) would open a special office in Italy to handle the purchases; study the development of the Italian industry so as to keep the clients continuously informed; to handle the payments for merchandise sold in Italy; to handle the payments for merchandise to be sent to America; and to handle the shipping of same. The Lictorio Company could also assume the responsibility of organizing, in collaboration with Sears, an office in Chicago and New York for the selling of the merchandise imported.

THE REQUIREMENTS OF THE LICTORIO COMPANY FROM SEARS:

In order to conclude the proposals, it is necessary that I return to Italy. This, not only because I am the author of the plan and therefore no one better than I could handle the matter more competently, but also because, modesty set aside, I do not believe there is in the United States, another Italo-American who has, in Governmental circles (especially the two Ministers who are interes ting themselves in the matter) as many influential acquaintances and connections as I have.

The Lictorio Company has already sustained expenses in connection with my previous trip amounting to more than $5,000. Now the company does not find itself in a position to continue financing me, consequently, we are asking Sears International for an advance of a few thousand dollars. As collateral we are willing to deposit in your name $10,000 in shares of the Lictorio Company. Also for better guarantee the Lictorio Company is willing to increase my insurance (against all risks) from $5,000 to $15,000 and Sears would become beneficiary in proportion of the sum advanced.

CONCLUSION:

As I stated and demonstrated many times, Sears will make a very profitable deal by going into the project that I proposed and in which the Italian Government is very much interested. More-

b) I would immediately open an office through which I could acquire data concerning the Italian industrial productions, collect samples of products that Sears could require and their relative prices and forwarding same to Sears International.

c) Contemporary to my work in Italy, Sears, in collaboration with the Chicago office of the Mistorio Company, would send a questionnaire, soliciting illustrative material of the Italian industrial products, to all the buyers and managers of 700 stores and to the managers of the establishments of the Company, to the importers with whom Sears does business, business firms, etc., of products that Italy could furnish and to the American industrialists from whom Sears acquires merchandise such as clothing, underwear, furniture, etc., asking what would interest them and approximately what would be the quantity of Italian products they could purchase through Sears, providing the prices are favorable. As soon as the samples, prices and information as above stated have been collected, it will be possible to immediately start selling. A display (in Chicago, New York and other offices) organized by Sears with the co-operation of the Mistorio Company, and to which would be invited representatives of firms who might be interested in the acquisition of Italian products, could bring very good results and accelerate our sales.

d) As soon as the possibility of disposing, directly or through third parties, of the merchandise that Sears would buy in Italy, has been made, the Mistorio Company (if delegated by Sears) would open a special office in Italy to handle the purchases; study the development of the Italian industry so as to keep the clients continuously informed; to handle the payments for merchandise sold in Italy; to handle the payments for merchandise to be sent to America; and to handle the shipping of same. The Mistorio Company could also assume the responsibility of organizing, in collaboration with Sears, an office in Chicago and New York for the selling of the merchandise imported.

THE PROFITS OF THE MISTORIO COMPANY FROM SEARS:

In order to conclude the proposals, it is necessary that I return to Italy. This, not only because I am the author of the plan and therefore no one better than I could handle the matter more competently, but also because, modesty aside, I do not believe there is in the United States, another Italo-American who has, in Governmental circles (especially the two Ministers who are interested in the matter) as many influential acquaintances and connections as I have.

The Mistorio Company has already sustained expenses in connection with my previous trip amounting to more than $2,000. Now the company does not find itself in a position to continue financing me, consequently, we are asking Sears International for an advance of a few thousand dollars. As collaterals we are willing to deposit in your name $10,000 in shares of the Mistorio Company. Also for better guarantee the Mistorio Company is willing to increase my insurance (against all risks) from $5,000 to $15,000 and Sears would become beneficiary in proportion of the sum advanced.

CONCLUSION:

As I stated and demonstrated many times, Sears will make a very profitable deal by going into the project that I proposed and in which the Italian Government is very much interested. Moreover

over, this is the right moment because Italy in trying hard to increase her exports and to interest American firms in the development of East Africa, for which hundreds of millions of dollars worth of machinery and materials will be required. Sears, by acting quickly, will undoubtedly get the most advantageous and the highest share. All the scores are in her favor.

Awaiting a prompt decision in regard, I remain,

Respectfully yours,

Luigi Marianelli"

It is difficult to glean from plaintiffs' amended complaint or from their briefs upon just what theory their claim for damages herein is predicated. However, they seem to contend that by reason of defendants' rejection of Marianelli's proposals and demands as contained in his written report to Sears of April 24, 1939, the latter were guilty of an anticipatory breach of the contract between the parties of April 26, 1938.

Plaintiff Marianelli was the author of a "project or scheme to develop more business between Sears International, Inc., and Italian Government agencies, private persons or corporations of Italy." Negotiations between Marianelli and defendants, Sears, Roebuck & Co. and Sears International, Inc. (hereinafter for convenience sometimes referred to collectively as Sears) culminated in the letter agreement of April 26, 1938, set forth in the complaint. Under the terms of this agreement Marianelli agreed "to go to Italy within 60 *** days after May 1" at his own expense "in order to contract and develop the business" in accordance with his plan as outlined to Sears. He was appointed by the latter as their temporary representative "for Italy, its colonies and possessions" for a period of six months for the sale of defendants' merchandise and the purchase of Italian products in accordance with the exchange or part exchange plan proposed by him. It was expressly provided in the contract that "any arrangements of the above nature which you [Marianelli] may make are subject to written confirma-

ever, this is the right moment because Italy is trying hard to increase her exports and to interest American firms in the development of that nation, for which hundreds of millions of dollars worth of machinery and materials will be required. Sears, by acting quickly, will undoubtedly get the most advantageous and the highest share. All this seems one in her favor.

Awaiting a prompt decision in regard, I remain,

Respectfully yours,

Ralph Marianelli"

It is difficult to clean from plaintiffs' amended complaint or from their briefs upon just what theory their claim for damages herein is predicated. However, they seem to contend that by reason of defendants' rejection of Marianelli's proposals and demands as contained in his written report to Sears of April 24, 1929, the latter were guilty of an anticipatory breach of the contract between the parties of April 26, 1929.

Plaintiff Marianelli was the author of a "project or scheme to develop more business between Sears International, Inc., and Italian Government agencies, private persons or corporations of Italy." Negotiations between Marianelli and defendants, Sears, Roebuck & Co. and Sears International, Inc. (hereinafter for convenience sometimes referred to collectively as Sears) culminated in the letter agreement of April 26, 1929, set forth in the complaint. Under the terms of this agreement Marianelli agreed "to go to Italy within 30 *** days after May 1" at his own expense "in order to contract and develop the business" in accordance with his plan as outlined to Sears. He was appointed by the letter as their temporary representative "for Italy, its colonies and possessions" for a period of six months for the sale of defendants' merchandise and the purchase of Italian products in accordance with the exchange or part exchange plan proposed by him. It was expressly provided in the contract that "any arrangements of the above nature which you [Marianelli] may make are subject to written confirma-

tion" by Sears. The contract then provided: "Sears International, Inc., further agrees that if, after the expiration of the above mentioned trial period of six *** months of your appointment as their temporary representative for Italy and the Italian Colonies and Possessions, you will have secured business acceptable to them of not less than $100,000, you will be appointed in the same capacity for an additional trial period of six *** months in order to bring to a conclusion any business transactions which you may have started. If, during this additional trial period of six *** months, the sales of Sears International merchandise made by you and accepted by us exceed $250,000, you shall be appointed permanent representative of Sears International for Italy, its Colonies and Possessions. Following your appointment as permanent representative, after the expiration of the above mentioned trial periods of time, a six month's notice will be required by either you or Sears International, Inc. if it will be your or their desire to cancel the agreement in question."

Marianelli went to Italy early in July, 1938, remained there about seven months and then returned to Chicago. It is not alleged in the complaint that he made any sales or purchases in defendants' behalf during the first six month period covered by the contract and plaintiffs are therefore precluded from making any claim for commissions on actual sales or purchases made for Sears during said period. It will be noted that the extension of Marianelli's authority to act as Sears' temporary representative in Italy for the second six month period covered by the contract was, under the terms thereof, contingent upon his having "secured business acceptable to them of not less than $100,000 *** during the first trial period of six months." It is not alleged in the complaint that Marianelli was entitled to an extension of the contract for the second six month period by reason of his compliance with the condi-

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Marianelli went to Italy early in July, 1938, remained there about seven months and then returned to Chicago. It is not alleged in the complaint that he made any sales or purchases in defendants' behalf during the first six month period covered by the contract and plaintiffs are therefore precluded from making any claim for commissions on actual sales or purchases made for Sears during said period. It will be noted that the extension of Marianelli's authority to act as Sears' temporary representative in Italy for the second six month period covered by the contract was, under the terms thereof, contingent upon his having "secured business acceptable to them of not less than $100,000 *** during the first trial period of six months." It is not alleged in the complaint that Marianelli was entitled to an extension of the contract for the second six month period by reason of his compliance with the condi-

tions of said contract as to purchases or sales made by him in Sears' behalf during the first six month period, but he contends that the contract was extended for the second six month period by reason of the following alleged agreement: "That with the consent and permission of the defendants, one of the stockholders and officials of The Lictorio, Inc., was an employee of defendants, and that when plaintiffs reported to the Vice President of Sears International, Inc., Mr. Kearney (on or about March 6, 1939), the successful termination of the plaintiff's negotiations, the said stockholder and official of the plaintiff corporation, then asked the said Kearney whether or not it was necessary to renew or proceed with the signing of a new agreement with The Lictorio, Inc., or the said Marianelli, or if he, the said Kearney, still considered effective the one signed between Sears and Marianelli, dated April 26, 1938; that the said Vice President Kearney, of Sears International, Inc., stated that inasmuch as the sold Marianelli had succeeded in bringing to such a successful conclusion the negotiations for an amount which was so much above what they had asked of the said Marianelli, that the plaintiffs had the right to another six months' time for the purpose of bringing to a conclusion the negotiations with the Italian Government; that consequently it was not necessary to make out another contract."

Even though the contract between the parties was extended to cover the second period of six months by the alleged oral agreement, still we fail to see from any allegation of the complaint wherein Marianelli performed any services for defendants pursuant to the terms of the agreement of April 26, 1938, which entitled him to remuneration. While plaintiffs' amended complaint is replete with allegations that Marianelli successfully concluded negotiations with the Italian Government and Italian officials for the sale of defendants products to the Italian Government or private interest in Italy and for the purchase by defendants of

tions of said contract as to purchases or sales made by him in Sears' behalf during the first six month period, but he contends that the contract was extended for the second six month period by reason of the following alleged agreement: "that with the consent and permission of the defendants, one of the stockholders and officials of The Listorio, Inc., was an employee of defendants, and that then plaintiffs reported to the Vice President of Sears International, Inc., Mr. Kearney (on or about March 6, 1939), the successful termination of the plaintiff's negotiations, the said stockholder and official of the plaintiff corporation, then asked the said Kearney whether or not it was necessary to renew or proceed with the signing of a new agreement with The Listorio, Inc., or the said Martinelli, or if he, the said Kearney, still considered effective the one signed between Sears and Martinelli, dated April 26, 1939; that the said Vice President Kearney, of Sears International, Inc., stated that inasmuch as the said Martinelli had succeeded in bringing to such a successful conclusion the negotiations for an amount which was so much above what they had asked of the said Martinelli, that the plaintiffs had the right to another six months' time for the purpose of bringing to a conclusion the negotiations with the Italian Government; that consequently it was not necessary to make out another contract."

Even though the contract between the parties was extended to cover the second period of six months by the alleged oral agreement, still we fail to see from any allegation of the complaint wherein Martinelli performed any services for defendants pursuant to the terms of the agreement of April 26, 1939, which entitled him to remuneration. While plaintiffs' amended complaint is replete with allegations that Martinelli successfully concluded negotiations with the Italian Government and Italian officials for the sale of defendants products to the Italian Government or private interest in Italy and for the purchase by defendants of

Italian products for importation to the United States, there are no allegations of facts therein which show the result of said negotiations or which show that he effected even a single purchase or sale in Sears' behalf either during the first six month period or the second six month period covered by the contract. We have searched the complaint in vain for any alleged facts which indicate that defendants ever agreed to pay Marianelli anything for his unsuccessful negotiations. What they did agree to pay him was a commission on actual purchase and sales contracts which resulted from his negotiations and which were accepted by them, and he agreed to go to Italy and carry on his negotiations "at his own expense."

It is alleged in paragraph 7 of plaintiffs' complaint "that shortly following the said letter of April 26, 1938, and on or about July 12, 1938, the said Luigi Marianelli proceeded to Italy, in pursuance of the contract and plan adopted by the plaintiffs and defendants, and thereafter for approximately seven months pursued said plans in Italy with various officials of the Italian Government and its colonial enterprises; that said efforts of said Marianelli resulted in plaintiffs securing from the Italian Government a memorandum of Italian products which the Italian Government was willing to sell to Sears, Roebuck & Co., and a list of the products which the Italian Government was willing to buy from Sears, Roebuck & Co., in addition to the purchase of prefabricated houses, in accordance with plans and designs furnished in books supplied by the defendants to Marianelli and by him delivered to the officials of the Italian Government; that said Italian products were to be paid for by Sears, Roebuck & Co. from funds deposited in banks of the Kingdom of Italy to its account in payment for the products sold to the Italian Government, and particularly to its Italian Colonies in Italian East Africa, by Sears, Roebuck & Co."

There is no allegation in this paragraph or in any other

Italian products for importation to the United States, there are no allegations of facts therein which show the result of said negotiations or which show that he effected even a single purchase or sale in Sears' behalf either during the first six month period or the second six month period covered by the contract. We have searched the complaint in vain for any alleged facts which indicate that defendants ever agreed to pay Marinelli anything for his unsuccessful negotiations. What they did agree to pay him was a commission on actual purchase and sales contracts which resulted from his negotiations and which were accepted by them, and he agreed to go to Italy and carry on his negotiations "at his own expense."

It is alleged in paragraph 7 of plaintiffs' complaint "that shortly following the said letter of April 6, 1938, and on or about July 12, 1938, the said Luigi Marinelli proceeded to Italy, in pursuance of the contract and plan adopted by the plaintiffs and defendants, and thereafter for approximately seven months pursued said plans in Italy with various officials of the Italian Government and its colonial enterprises; that said efforts of said Marinelli resulted in plaintiffs securing from the Italian Government a memorandum of Italian products which the Italian Government was willing to sell to Sears, Roebuck & Co., and a list of the products which the Italian Government was willing to buy from Sears, Roebuck & Co., in addition to the purchase of prefabricated houses, in accordance with plans and designs furnished in books supplied by the defendants to Marinelli and by him delivered to the officials of the Italian Government; that said Italian products were to be paid for by Sears, Roebuck & Co. from funds deposited in banks of the Kingdom of Italy to its account in payment for the products sold to the Italian Government, and particularly to its Italian Colonies in Italian East Africa, by Sears, Roebuck & Co."

There is no allegation in this paragraph or in any other

paragraph of the complaint that the so-called "memorandum" above referred to was ever delivered to the defendants or even shown to them. An examination of this "memorandum," which was attached to the complaint as Exhibit 3, as heretofore shown, fails to disclose where it emanated from or to whom, if anyone, it was delivered or when.

It is alleged in paragraph 8 of the complaint that upon Marianelli's return to the United States from Italy he made verbal reports to Sears as to the result of his efforts; and that certain officials of Sears "expressed themselves as well pleased with the success of his endeavors and stated to the said Marianelli that they had no doubt the plans which had been accomplished by the said Marianelli in Italy would be carried forward by the defendants herein, but that it would be advisable to submit same to one Donald Nelson, a Vice President of defendant, Sears, Roebuck & Co." It was further alleged in said paragraph that officials of Sears requested "plaintiffs to submit written reports and proposals with reference to the services which had been performed by the plaintiffs in Italy, all of which the plaintiffs proceeded to do." Marianelli's letter of April 24, 1939 was the only written report made by him to defendants after his return from Italy. It will be considered later.

Paragraph 11 of the complaint contains the following allegations:

"That during the negotiations between the plaintiffs and the Italian Government, its officials and representatives, all of which was reported by the plaintiffs to the defendants, it was agreed that the amount of goods which would be interchanged or exchanged between the said Italian Government, its colonial possessions and industries, and the defendants, would be at least $15,000,000 during a two-year period; that upon said amount of money, the plaintiffs would be entitled to a commission of 7-1/2%

paragraph of the complaint that the so-called "memorandum" above referred to was ever delivered to the defendants or even shown to them. An examination of this "memorandum," which was attached to the complaint as Exhibit 3, as heretofore shown, fails to disclose where it emanated from or to whom, if anyone, it was delivered or when.

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Paragraph 11 of the complaint contains the following allegations:

"That during the negotiations between the plaintiffs and the Italian Government, its officials and representatives, all of which was reported by the plaintiffs to the defendants, it was agreed that the amount of goods which would be interchanged or exchanged between the said Italian Government, its colonial possessions and industries, and the defendants, would be at least $17,000,000 during a two-year period; that upon said amount of money, the plaintiffs would be entitled to a commission of 7-1/2%

by virtue of said letter of April 26, 1938, hereinbefore alleged." The allegations contained in paragraph 11, as well as numerous other similar allegations of the complaint as to "the success of his [Marianelli's] endeavors," "plans which had been accomplished," "successful termination of plaintiff's negotiations" and "successful conclusion of the negotiations," are not averments of facts but of mere generalities and conclusions. In any event said allegations are completely refuted and contradicted by Marianelli's written report of April 24, 1939, which was submitted to defendants just one day less than a year after the execution of the contract of April 26, 1938. As was said in Bunker Hill Country Club v. McElhatton, 282 Ill. App. 221, 236: "It is well settled law in this State that where there is discrepancy or contradiction between allegations in a complaint and facts as shown in an exhibit attached to and made a part of the complaint, the exhibit will control; and that a motion to strike the complaint does not admit such allegations as are in conflict with facts disclosed by such exhibit. (Lyons v. 333 North Michigan Ave. Bldg. Corp., 277 Ill. App. 93.)" Pleadings are to be construed strictly, except as to matter of form, and a motion to dismiss does not admit conclusions or inferences by the pleader. (Klein v. Chicago Title & Trust Co., 295 Ill. App. 208; Leitzman v. Radio Broadcasting Station, 282 Ill. App. 203.)

It will be noted from his written report, plaintiffs' Exhibit 5 attached to their complaint, that Marianelli's plan was still nebulous in April, 1939. In fact he did not seem to be any further ahead with said plan when he made this written report on April 24, 1939 than he was when the parties entered into the contract of April 26, 1938.

The opening paragraph of the written report made by Marianelli to Sears was to the effect that Guarneri, Minister of Exchanges and Currencies of Italy, was interested and that

by virtue of said letter of April 26, 1938, heretofore alleged."

The allegations contained in paragraph 11, as well as numerous other similar allegations of the complaint as to "the success of his [Marianelli's] endeavors," "plans which had been accomplished," "successful termination of plaintiff's negotiations" and "successful conclusion of the negotiations," are not averments of facts but of mere generalities and conclusions. In any event said allegations are completely refuted and contradicted by Marianelli's written report of April 24, 1939, which was submitted to defendants just one day less than a year after the execution of the contract of April 26, 1938. As was said in Bunker Hill Country Club v. McLlhatton, 282 Ill. App. 221, 236: "It is well settled law in this state that where there is discrepancy or contradiction between allegations in a complaint and facts as shown in an exhibit attached to and made a part of the complaint, the exhibit will control; and that a motion to strike the complaint does not admit such allegations as are in conflict with facts disclosed by such exhibit. (Lyons v. 333 North Michigan Ave. Bldg. Corp., 277 Ill. App. 93.)" Pleadings are to be construed strictly, except as to matter of form, and a motion to dismiss does not admit conclusions or inferences by the pleader. (Klein v. Chicago Title & Trust Co., 295 Ill. App. 208; Lettman v. Radio Broadcasting Station, 282 Ill. App. 203.)

It will be noted from his written report, plaintiff's Exhibit 5 attached to their complaint, that Marianelli's plan was still nebulous in April, 1939. In fact he did not seem to be any further ahead with said plan when he made this written report on April 24, 1939 than he was when the parties entered into the contract of April 26, 1938.

The opening paragraph of the written report made by Marianelli to Moore was to the effect that Guarneri, Minister of Exchanges and Currencies of Italy, was interested and that

the Italian Government expressed its desire to increase trade with the United States and consented to the acquisition of products such as houses, agricultural implements and machinery from Sears.

The remainder of the report is divided under several headings. The first heading is:

"The Proposals and Conditions of the Italian Government." These are that (a) no overprices will be paid for Sears' products purchased by the Colonial department; (b) the Italian Government is ready and willing to give the permit for importation of machinery manufactured by other American firms, such manufacturing firms to pay Sears a commission; (c) for raw products, a premium of 10% to 15% above the market price will be paid by the importers; (d) the minimum amount of business between Sears and Italy for two years should be at least $15,000,000 and possibly $25,000,000, upon which from calculations made by Marianelli Sears would realize a profit of 20% to 25%.

It will be noted that under this heading no mention is made of a single item which the Italian Government agreed to buy from or sell to Sears and that not a single price is quoted. It is significant that under this heading no mention is made of the "memorandum," heretofore referred to, which the complaint alleged was the memorandum of the Italian Government.

The next heading in the report is:

"The counter-proposals that Sears should make and the Guarantees that should be requested."

Under this heading appear eight suggestions of Marianelli to Sears as to what proposals the latter should make and what guarantees it should request. All of these suggestions as to counter proposals and guarantees are nothing more than generalities and this part of the report concludes with the advice that "Sears should assure the Italian Government that the merchandise purchsed and to be sold to America

the Italian Government expressed its desire to increase trade with the United States and commented to the acquisition of products such as horses, agricultural implements and machinery from Sears.

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These are that (a) no overprices will be paid for Sears' products purchased by the colonial department; (b) the Italian Government is ready and willing to give the permit for importation of machinery manufactured by other American firms, such manufacturing firms to pay Sears a commission; (c) for raw products, a premium of 10% to 15% above the market price will be paid by the importers; (d) the minimum amount of business between Sears and Italy for two years should be at least $15,000,000 and possibly $25,000,000, upon which from colonial sales made by Montgomery Sears would realize a profit of 20% to 25%.

It will be noted that under this heading no mention is made of a single item which the Italian Government agreed to buy from or sell to Sears and that not a single price is quoted. It is significant that under this heading no mention is made of the "memorandum," heretofore referred to, which the complaint alleged was the memorandum of the Italian Government.

The next heading in the report is:

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will constitute an increase in Italian exportations, that is that she would replace the merchandise previously purchased" from other countries.

The next heading of the report is:

"The advantages that Sears would derive."

Under this heading follow several fantastic prophecies.

The next heading of the report is:

"How the project could be effected."

Under this heading Marianelli proposed that he would return to Rome and would see to it that the Ministry for Exchanges of Italy would accept and approve the counter proposals which earlier in the report he suggested be made by Sears to the Italian Government; that he would open an office in Italy to acquire data concerning Italian industrial production; and that he would collect samples of products that Sears would require and ascertain the prices of same.

In other words almost a year after the letter agreement of April 26, 1938 Marianelli proposed in more elaborate detail that he would do the very things which he should have done at the outset. The parties had not advanced from the point whence they started. In the agreement of April 26, 1938, it was expressly stated that Marianelli should obtain samples and prices of merchandise in Italy. A year later, after he had spent seven months in Italy and had returned to the United States, he proposed that he again journey to Rome and set up offices for the purpose of obtaining samples and prices of merchandise in which defendants might be interested. The amended complaint suggests no reason or excuse for Marianelli's failure to do these very things during the preceding year.

The next heading of the report is:

"The requirements of the Lictorio Company from Sears."

Under this heading Marianelli states that the Lictorio

will constitute an increase in Italian exportations, that is that she would replace the merchandise previously purchased" from other countries.

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The next heading of the report is:

"The requirements of the Dictorio Company from Sears."

Under this heading Marianelli states that the Dictorio

Company had incurred expenses of more than $5,000 in connection with his previous trip to Italy and was not in a position to continue financing him. It is then stated: "Consequently we are asking Sears International for an advance of a few thousand dollars."

Under the heading:

"Conclusion"

Marianelli states that Sears would make a very profitable deal "by going into the project that I proposed and in which the Italian Government is very much interested;" that "this is the right moment because Italy is trying hard to increase her exports and to interest American firms in the development of East Africa for which hundreds of millions of dollars worth of machinery and materials would be required." The last sentence of the written report reads: "Awaiting a prompt decision in regard, I remain, Respectfully yours, Luigi Marianelli (Signed)."

On May 11, 1939 Artamonoff, President of Sears International, wrote Marianelli advising him that the executives of Sears, Roebuck & Co. had decided against consideration of his written proposal.

Marianelli's written report of April 24, 1939, clearly shows that the Italian Government had never taken action of any kind, official or otherwise, in connection with the subject matter of the contract of April 26, 1938. The report is a self serving document and is simply a letter from Marianelli to Sears, which states at most that the Italian Government had manifested a desire to increase trade with the United States. The report considered in its entirety indicates nothing more than that Marianelli had had some conversations with persons he said were connected with the Italian Government. It definitely shows that plaintiffs never obtained a commitment of any kind. It contains no definite proposal or offer by the Italian Government or any one else in

Company had incurred expenses of more than $5,000 in connection with his previous trip to Italy and was not in a position to continue financing him. It is then stated: "Consequently we are asking Sears International for an advance of a few thousand dollars."

Under the heading:

"Consulting"

Marinelli states that Sears would make a very profitable deal "by going into the project that I proposed and in which the Italian Government is very much interested;" that "this is the right moment because Italy is trying hard to increase her exports and to interest American firms in the development of East Africa for which hundreds of millions of dollars worth of machinery and materials would be required." The last sentence of the written report reads: "Awaiting a prompt decision in regard, I remain, Respectfully yours, Luigi Marinelli (signed)."

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Italy to buy or sell any specific commodities or merchandise at any specific prices. In essence Marianelli's report was a confession that he had been unable in the time allotted to him, not only to make a sale of merchandise on behalf of Sears, but even to obtain an offer having any degree of certainty or authenticity. At best said report was a new proposal to Sears which defendants were fully justified in rejecting. Marianelli himself knew that this was so because in the very last sentence of his report he stated that he awaited "a prompt decision." If defendants were already obligated to plaintiffs under the contract of April 26, 1938, as it is now claimed, why did Marianelli's request "a prompt decision" as to the proposals contained in his written report of April 24, 1939? We think that said request shows conclusively that his proposals contemplated a new and independent contract with defendants and that he fully appreciated that they were no longer bound under the contract of April 26, 1938 and that they had incurred no liability thereunder.

Plaintiffs' contention that since the contract between the parties of April 26, 1938 was executory and because defendants were guilty of an anticipatory breach thereof by reason of their rejection of Marianelli's proposals contained in his written report of April 24, 1939 they [plaintiffs] are entitled to the damages claimed, is absolutely without merit. As we have already shown plaintiffs' complaint fails to allege any facts which constitute an anticipatory breach of the contract of April 26, 1938 on the part of defendants or that show Sears breached said contract in any respect. There is no allegation in the complaint that Marianelli ever submitted to Sears even one concrete proposal from the Italian Government or its officials or from anybody else in Italy to purchase from or to sell to defendants any definite product in any definite amount at any definite price.

Since the amended complaint does not state a cause of

Italy to buy or sell any specific commodities or merchandise at any specific prices. In essence Marianelli's report was a confession that he had been unable in the time allotted to him, not only to make a sale of merchandise on behalf of Sears, but even to obtain an offer having any degree of certainty or authenticity. At best said report was a new proposal to Sears which defendants were fully justified in rejecting. Marianelli himself knew that this was so because in the very last sentence of his report he stated that he awaited "a prompt decision." If defendants were already obligated to plaintiffs under the contract of April 26, 1938, as it is now claimed, why did Marianelli's request "a prompt decision" as to the proposals contained in his written report of April 24, 1939? We think that said request shows conclusively that his proposals contemplated a new and independent contract with defendants and that he fully appreciated that they were no longer bound under the contract of April 26, 1938 and that they had incurred no liability thereunder.

Plaintiffs' contention that since the contract between the parties of April 26, 1938 was mandatory and because defendants were guilty of an anticipatory breach thereof by reason of their rejection of Marianelli's proposals contained in his written report of April 24, 1939 they [plaintiffs] are entitled to the damages claimed, is absolutely without merit. As we have already shown plaintiffs' complaint fails to allege any facts which constitute an anticipatory breach of the contract of April 26, 1938 on the part of defendants or that Sears breached said contract in any respect. There is no allegation in the complaint that Marianelli ever submitted to Sears even one concrete proposal from the Italian Government or its officials or from anybody else in Italy to purchase from or to sell to defendants any definite product in any definite amount at any definite price.

Since the amended complaint does not state a cause of

action, the order of the Superior court, sustaining defendants' motion to strike said complaint and ordering the suit dismissed, was properly entered.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

action, the order of the superior court, sustaining defendants' motion to strike said complaint and ordering the suit dismissed, was properly entered.

ORDER AFFIRMED.

Friend and Beamian, JJ., concur.

41821

JAMES T. SHEALY, Appellee,
v.
CHARLES L. SCHWERIN, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant, Charles L. Schwerin, seeks to reverse a judgment for $2,500 entered against him in the Municipal court in an action brought by plaintiff, James T. Shealy, which was tried by the court without a jury. The original statement of claim was filed by plaintiff December 9, 1938. An amended statement of claim was filed May 8, 1940 and on the same date an alias summons was issued returnable May 24, 1940. The written appearance of defendant and his attorney was filed May 20, 1940. On May 24, 1940 an order was entered granting defendant an extention of ten days for filing his statement of defense. On June 3, 1940 defendant filed his statement of defense and a written demand for a jury trial. On June 20, 1940 an order was entered sustaining plaintiff's motion to strike defendant's demand for a jury trial from the files. On November 4, 1940 plaintiff filed his second amended statement of claim in answer to which defendant filed his statement of defense and December 16, 1940 plaintiff filed a reply to said defense. As heretofore shown the cause was tried by the court without a jury, the issues were found in favor of plaintiff and judgment rendered against defendant for $2,500.

Under plaintiff's original statement of claim he sought to recover $1,000 and interest thereon on defendant's promise to pay same. Plaintiff's first amended statement of claim sought recovery of the $1,000 referred to in the original statement of claim and in addition thereto an item of $487.15 which he claimed to be due him by reason of the assignment to him by Champlin-Shealy Printing Company of its claim against defendant in said amount.

41821

JAMES T. SHEALY,
Appellee,

v.

CHARLES I. SCHWERIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE ZIMAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant, Charles I. Schwerin, seeks to reverse a judgment for $2,500 entered against him in the municipal court in an action brought by plaintiff, James T. Shealy, which was tried by the court without a jury. The original statement of claim was filed by plaintiff December 9, 1938. An amended statement of claim was filed May 8, 1940 and on the same date an alias summons was issued returnable May 14, 1940. The written appearance of defendant and his attorney was filed May 20, 1940. On May 24, 1940 an order was entered granting defendant an extension of ten days for filing his statement of defense. On June 3, 1940 defendant filed his statement of defense and a written demand for a jury trial. On June 20, 1940 an order was entered sustaining plaintiff's motion to strike defendant's demand for a jury trial from the files. On November 4, 1940 plaintiff filed his second amended statement of claim in answer to which defendant filed his statement of defense and December 10, 1940 plaintiff filed a reply to said defense. As heretofore shown the cause was tried by the court without a jury, the issues were found in favor of plaintiff and judgment rendered against defendant for $2,500.

Under plaintiff's original statement of claim he sought to recover $1,000 and interest thereon on defendant's promise to pay same. Plaintiff's first amended statement of claim sought recovery of the $1,000 referred to in the original statement of claim and in addition thereto an item of $497.19 which he claimed to be due him by reason of the assignment to him by Dunphin-Shealy Printing Company of its claim against defendant in said amount.

Plaintiff's second amended statement of claim included his claim for $487.15 under the aforementioned assignment and averred as to the other item for which he sought recovery:

"1-a. On July 9, 1934, at Chicago, Illinois, and at defendant's special instance and request, plaintiff turned over and delivered to defendant the sum of $1,000, and in consideration thereof, the defendant then and there made the following agreement or promise in writing with reference thereto, which writing was then and there delivered to the plaintiff, is still in full force and effect and is, in words and figures, as follows, to-wit:

'Mr. James T. Shealy
100 N. LaSalle St.
Chicago, Ill.

July 9, 1934

Dear Mr. Shealy:

In transmitting the enclosed receipt to you, this is to confirm the statement I made to you - that if this $1,000 is not finally repaid to you, I will see to it, after June 1, 1935, that any deficiency in your original subscription is made up to you.

Very truly yours,
(Signed) Charles L. Schwerin'

"The receipt and subscription above referred to are, in words and figures, as follows, to-wit:

'Chicago, Illinois, 7-9, 1934

RECEIVED OF JAMES T. SHEALY, Chicago, Illinois, the sum of ONE THOUSAND DOLLARS----------($1,000.00) accepted upon the following conditions:
This receipt to be exchanged for the Note of Kremm, Seeley and Schwerin, Trustees, in the amount of $1,500, under a Trust in which they will hold an equal amount of Bullion Notes or Ore Warrants of the CENTRAL CITY GOLD MINES CO., (now being incorporated), which Note will be due June 1, 1935, and which Note will further call for the payment of $50.00 on October 1, 1934, and $50.00 weekly thereafter until fully paid; and the following certification of Kremm, Seeley and Schwerin of a 1% interest, in perpetuity, in the profits paid to them or for their account by the Central City Gold Mines Co., they, in turn, owning all the stock of the Central City Gold Mines Co.,

(Signed) Geo. F. Kremm
(Signed) L. M. Seeley
(Signed) Chas. L. Schwerin'

"b. Up to and including the first day of June, 1935, and up to and including the present time, the sum of $1,000 referred to

Plaintiff's second amended statement of claim included Ma claim for $647.15 under the aforementioned assignment and averred as to the other item for which he sought recovery:

"I-a. On July 9, 1934, at Chicago, Illinois, and at defendant's special instance and request, plaintiff turned over and delivered to defendant the sum of $1,000, and in consideration thereof, the defendant then and there made the following agreement or promise in writing with reference thereto, which writing was then and there delivered to the plaintiff, is still in full force and effect and is, in words and figures, as follows, to-wit:

'Mr. James T. Cheely July 9, 1934
100 N. Dearborn St.
Chicago, Ill.

Dear Mr. Cheely:

In transmitting the enclosed receipt to you, this is to confirm the statement I made to you - that if this $1,000 is not finally repaid to you, I will see to it, after June 1, 1935, that any deficiency in your original subscription is made up to you.

Very truly yours,
(Signed) Charles E. Schwerin'

"The receipt and subscription above referred to are, in words and figures, as follows, to-wit:

'Chicago, Illinois, 7-9, 1934

RECEIVED OF JAMES T. CHEELY, Chicago, Illinois, the sum of ONE THOUSAND DOLLARS----------($1,000.00) accepted upon the following conditions:
This receipt is to be exchanged for the Note of Kramer, Cheely and Schwerin, Trustees, in the amount of $1,500, under a Trust in which they will hold an equal amount of Indian Notes or Ore Certificates of the CENTRAL CITY GOLD MINING CO., (now being incorporated), which Note will be due June 1, 1935, and which Note will further call for the payment of $30.00 on October 1, 1934, and $50.00 monthly thereafter until fully paid; and the following certification of Kramer, Cheely and Schwerin of a 1% interest, in personality, in the profits paid to them or for their account by the Central City Gold Mines Co., they, in turn, owning all the stock of the Central City Gold Mines Co.,

(Signed) Geo. P. Kramer
(Signed) J. T. Cheely
(Signed) Chas. E. Schwerin'

"b. Up to and including the first day of June, 1935, and up to and including the present time, the sum of $1,000 referred to

in paragraph 1-a hereof or any part thereof has not been repaid to plaintiff, but there has been a total deficiency in the subscription above referred to, and though plaintiff has often demanded of the defendant that he comply with his agreement and promise as aforesaid and pay to plaintiff the sums of money due plaintiff thereunder, as yet defendant has refused and refuses to do so."

Defendant contends (1) that "the trial court erred in striking from the files defendant's demand for a jury trial;" and (2) that "the trial court erred in entering judgment for the plaintiff in the sum of $2,500 because that sum was in excess of the specific amounts claimed by the plaintiff's pleadings." No report of proceedings is before us, defendant's contentions being predicated solely on the common law record.

There is no merit in defendant's first contention. When defendant's written appearance was filed herein, Rule 167 of the Municipal court of Chicago then in force provided as follows: "Issues of fact in any action which either party is entitled to have tried by jury shall be tried without a jury unless a demand in writing of a trial by jury is filed by the plaintiff or by the defendant. Such demand, if it be for the trial of the issues which may be raised upon the plaintiff's statement of claim, if it be a demand of the plaintiff, must be filed by him at the time he commences his action, or <u>if it be a demand of the defendant, it must be filed by him at the time he enters his appearance.</u> ***" (Italics ours.)

The foregoing italicized portion of the rule is clear and unambiguous and plainly states that if defendant desires a jury trial he must file a demand for same at the time he enters his appearance. There were no unusual or extraordinary circumstances in this case that would justify a departure from the provision of the rule requiring the defendant to file his jury demand at the

in paragraph 1-a hereof or any part thereof has not been repaid to plaintiff, but there has been a total deficiency in the subscription above referred to, and though plaintiff has often demanded of the defendant that he comply with his agreement and promise as aforesaid and pay to plaintiff the sums of money due plaintiff thereunder, as yet defendant has refused and refuses to do so."

Defendant contends (1) that "the trial court erred in striking from the files defendant's demand for a jury trial;" and (2) that "the trial court erred in entering judgment for the plaintiff in the sum of $2,500 because that sum was in excess of the specific amounts claimed by the plaintiff's pleadings." No report of proceedings is before us, defendant's contentions being predicated solely on the common law record.

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The foregoing italicized portion of the rule is clear and unambiguous and plainly states that if defendant desires a jury trial he must file a demand for same at the time he enters his appearance. There were no unusual or extraordinary circumstances in this case that would justify a departure from the provision of the rule requiring the defendant to file his jury demand at the

time he entered his appearance. It cannot be said that defendant was unlawfully deprived of a jury trial when his failure to receive such a trial was due entirely to his own negligence in not demanding same at the time prescribed by the aforesaid rule of the Municipal court.

As to defendant's second contention we think that the trial court erred in entering judgment for $2,500, which amount was in excess of the specific amounts plus interest which plaintiff claimed in his second amended statement of claim. An examination of said pleading demonstrates conclusively that it was predicated on two definite specific items with interest thereon respectively. First was the item of $487.15 due plaintiff from defendant under the assignment from the Champlin-Shealy Printing Company. The second item was $1,000 claimed to be due from defendant under his promise to pay same contained in his letter of July 9, 1934. This letter is set forth in plaintiff's second amended statement of claim. The right to recover this $1,000 is based solely on the promise made by defendant in said letter. Plaintiff made no claim for recovery except as to the two items of $487.15 and $1,000 with interest on said amounts respectively. Plaintiff never claimed that defendant promised to pay him more than $1,000. That was his claim in the original statement of claim. That was his claim in his first amended statement of claim and that was his claim in the second amended statement of claim. Thus allowing plaintiff all that he claimed, $487.15 due under the assignment plus interest thereon and $1,000 due by reason of defendant's written promise to pay same plus interest on said amount, the judgment should have been for an amount considerably less than $2,500.

Plaintiff asserts that he had the right to recover and have included in his judgment the amount of $1,500 which was mentioned in the "Receipt and Subscription" set forth in the second amended statement of claim. It is true that this "Receipt and Subscrip-

time he entered his appearance. It cannot be said that defendant was unlawfully deprived of a jury trial when his failure to receive such a trial was due entirely to his own negligence in not insisting on the time prescribed by the aforesaid rule of the municipal court.

As to defendant's second contention we think that the trial court erred in entering judgment for $2,500, which amount was in excess of the specific amounts plus interest which plaintiff claimed in his second amended statement of claim. An examination of said pleading demonstrates conclusively that it was predicated on two definite specific items with interest thereon respectively. First was the item of $487.15 due plaintiff from defendant under the assignment from the Champlin-Hively Printing Company. The second item was $1,000 claimed to be due from defendant under his promise to pay same contained in his letter of July 9, 1934. This letter is set forth in plaintiff's second amended statement of claim. The right to recover this $1,000 is based solely on the promise made by defendant in said letter. Plaintiff made no claim for recovery except as to the two items of $487.15 and $1,000 with interest on said amounts respectively. Plaintiff never claimed that defendant promised to pay him more than $1,000. That was his claim in the original statement of claim. That was his claim in his first amended statement of claim and that was his claim in the second amended statement of claim. Thus allowing plaintiff all that he claimed, $487.15 due under the assignment plus interest thereon and $1,000 due by reason of defendant's written promise to pay same plus interest on said amount, the judgment should have been for an amount considerably less than $2,500.

Plaintiff asserts that he had the right to recover and have included in his judgment the amount of $1,500 which was mentioned in the "Receipt and Subscription" set forth in the second amended statement of claim. It is true that this "Receipt and Subscrip-

tion" was contained in the second amended statement of claim but there was not a single allegation in said statement of claim that even referred to the "Receipt and Subscription" and there certainly was no allegation therein that it was relied upon for the recovery of $1,500 or any other amount. All the allegations of the second amended statement of claim pertaining to defendant's obligation to repay money advanced by plaintiff relied on defendant's promise contained in his letter of July 9, 1934 to pay plaintiff the specific amount of $1,000.

We are mindful of the rule that as a matter of pleading an amended pleading entirely supersedes a previous pleading if said amended pleading is complete in itself and does not refer to or adopt any portion of the original pleading or prior amended pleading of the party. It does not follow, however, that a party is not bound by his sworn admissions made in prior pleadings. Not only is plaintiff limited in his recovery to the specific amounts claimed in his second amended statement of claim but he is also bound by his sworn admission in his original and first amended statements of claim that defendant was indebted to him only to the extent of $1,000 on his written promise to pay said amount. The only exception with which we are familiar to the rule that a party is bound by his sworn admissions in prior pleadings is where it appears from a subsequent pleading that such admissions were made through mistake or inadvertence.

As has been seen plaintiff sought to recover solely on the two specific items of $1,000 and $487.15 and interest on said amounts respectively. That was all he was entitled to recover. There is no question as to the $487.15 item but the court erred in allowing him $1,500 with interest thereon instead of $1,000 with interest thereon.

The judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor

tion" was contained in the second amended statement of claim but there was not a single allegation in said statement of claim that even referred to the "receipt and subscription" and there certainly was no allegation therein that it was relied upon for the recovery of $1,500 or any other amount. All the allegations of the second amended statement of claim pertaining to defendant's obligation to repay money advanced by plaintiff relied on defendant's promise contained in his letter of July 9, 1924 to pay plaintiff the specific amount of $1,000.

We are mindful of the rule that as a matter of pleading an amended pleading entirely supersedes a previous pleading if said amended pleading is complete in itself and does not refer to or adopt any portion of the original pleading or prior amended pleading of the party. It does not follow, however, that a party is not bound by his sworn admissions made in prior pleadings. Yet only is plaintiff limited in his recovery to the specific amounts claimed in his second amended statement of claim but he is also bound by his sworn admission in his original and first amended statements of claim that defendant was indebted to him only to the extent of $1,000 on his written promise to pay said amount. The only exception with which we are familiar to the rule that a party is bound by his sworn admissions in prior pleadings is where it appears from a subsequent pleading that such admissions were made through mistake or inadvertence.

It has been seen plaintiff sought to recover solely on the two specific items of $1,000 and $487.15 and interest on said amounts respectively. That was all he was entitled to recover. There is no question as to the $487.15 item but the court erred in allowing him $1,500 with interest thereon instead of $1,000 with interest thereon.

The judgment of the municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor

of plaintiff and against defendant in an amount which will include the item of $487.15 with statutory interest thereon from November 10, 1937 and the item of $1,000 with statutory interest thereon from July 9, 1934.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

of plaintiff and against defendant in an amount which will include the item of $[illegible] with statutory interest thereon from November 10, 1927 and the item of $1,000 with statutory interest thereon from July 9, 1934.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend and Dennis, JJ., concur.

42359

ROLLIN A. EIB,
Appellant,

v.

JOHN H. GATELY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On July 11, 1941, plaintiff, Rollin A. Eib, filed his statement of claim in this action to recover a balance of $345 claimed to be due from defendant, John H. Gately, for drilling a well for him in Jasper county, Indiana. The return of summons by the bailiff of the Municipal court showed that personal service was had upon defendant but he filed no appearance or statement of defense. Judgment by default for $345 was entered against defendant November 24, 1941. Thereafter defendant filed a special appearance in which he challenged the jurisdiction of the trial court to enter the default judgment against him and he included in such special appearance a motion to quash the return of the summons and to vacate the judgment theretofore entered in favor of plaintiff. On February 24, 1942 an order was entered quashing the return of the summons and vacating the judgment. Plaintiff appeals from this order.

Plaintiff's praecipe for record requested the clerk of the Municipal court to prepare the common law record for transmission to this court. Defendant did not file a praecipe for any additional parts of the record for incorporation in the "record on appeal." Shortly after plaintiff-appellant filed his brief herein defendant-appellee filed a written motion that he be granted leave to file as part of the record in this court a report of proceedings as to matters which transpired upon the hearing of his motion to quash the return of the summons and to vacate the judgment. Defendant's motion to file such report of

ROLLIN A. BIB,
Appellant,

v.

JOHN H. GATELY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On July 11, 1941, plaintiff, Rollin A. Bib, filed his statement of claim in this action to recover a balance of $345 claimed to be due from defendant, John H. Gately, for drilling a well for him in Jasper county, Indiana. The return of summons by the bailiff of the Municipal court showed that personal service was had upon defendant but he filed no appearance or statement of defense. Judgment by default for $345 was entered against defendant November 24, 1941. Thereafter defendant filed a special appearance in which he challenged the jurisdiction of the trial court to enter the default judgment against him and he included in such special appearance a motion to quash the return of the summons and to vacate the judgment theretofore entered in favor of plaintiff. On February 24, 1942 an order was entered quashing the return of the summons and vacating the judgment. Plaintiff appeals from this order.

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proceedings as part of the record herein was denied since the time allowed for filing same had expired. At the suggestion of this court defendant filed an answer to plaintiff-appellant's objections to the motion to file the aforesaid report of proceedings as part of the record on appeal and he stated in said answer (referring to the report of proceedings) that "if it were not before the court we admit that the court would necessarily under the law be compelled to find with the appellant and reverse the decision of the lower court ***."

Defendant is an attorney and acted pro se in this proceeding both in the lower court and here. Inasmuch as his statement just above quoted constituted confession of error on the record before us it is unnecessary to discuss the errors relied upon for reversal in plaintiff-appellant's brief.

The order of the Municipal court of Chicago of February 24, 1942 quashing the return of summons and vacating the judgment of November 24, 1941, is reversed and the cause remanded with directions to confirm the judgment for $345 entered against defendant on November 24, 1941.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

proceedings as part of the record herein was denied since the time allowed for filing same had expired. At the suggestion of this court defendant filed an answer to plaintiff-appellant's objections to the motion to file the aforesaid report of proceedings as part of the record on appeal and he stated in said answer (referring to the report of proceedings) that "if it were not before the court we admit that the court would necessarily under the law be compelled to find with the appellant and reverse the decision of the lower court ***."

Defendant is an attorney and acted pro se in this proceeding both in the lower court and here. Inasmuch as his statement just above quoted constituted confession of error on the record before us it is unnecessary to discuss the errors relied upon for reversal in plaintiff-appellant's brief.

The order of the Municipal court of Chicago of February 24, 1942 quashing the return of summons and vacating the judgment of November 24, 1941, is reversed and the cause remanded with directions to confirm the judgment for $445 entered against defendant on November 24, 1941.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

42084

AVERY BRUNDAGE COMPANY, a corporation, Appellee,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
GRAND LODGE OF THE INDEPENDENT ORDER OF VIKINGS, Appellant.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1929, plaintiff, a construction contractor, undertook the erection of a four-story and basement building on the premises known as 149-155 East Ohio street, Chicago. The building which had previously occupied the premises was a two-story structure. Adjoining it to the east at 157 East Ohio street was an old three-story building, which defendant had acquired as owner in 1927. Defendant contends that there had been some common usage of the west wall of 157 East Ohio street for over 50 years, but no existing party wall agreement covered the rights of the adjoining owner.

On June 7, 1929, plaintiff advised defendant that it was about to start excavating for the foundation of the new building, and notified it to take the necessary steps to protect its property. Defendant thereupon engaged L. P. Friestedt Company to shore and underpin the wall, and paid some $1,600 for that service. However, Friestedt Company did not complete work on the entire wall but only the front eight feet and the rear four feet thereof, leaving the intervening space unsupported. Accordingly, June 27, 1939, plaintiff again notified defendant to shore the entire wall so that no damage would result to its building or delay plaintiff's work of excavation. When defendant refused to comply with the second request, plaintiff undertook the completion of the work, and thereafter brought an action of trespass on the case for the reasonable expenses incurred. Trial by the court without a jury

42023

AVERY [illegible] CONTRACT,
a corporation,
Appellee,

v.

GRAND LODGE OF THE INDEPENDENT
ORDER OF VIKINGS,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

In 1929, plaintiff, a construction contractor, undertook the erection of a four-story and basement building on the premises known as 149-151 East Ohio street, Chicago. The building which had previously occupied the premises was a two-story structure. Adjoining it to the east at 157 East Ohio street was an old three-story building, which defendant had acquired as owner in 1927. Defendant contends that there had been some common usage of the west wall of 157 East Ohio street for over 50 years, but no existing party wall agreement covered the rights of the adjoining owner.

On June 7, 1929, plaintiff advised defendant that it was about to start excavating for the foundation of the new building, and notified it to take the necessary steps to protect its property. Defendant thereupon engaged L. P. Friestedt Company to shore and underpin the wall, and paid some $1,600 for that service. However, Friestedt Company did not complete work on the entire wall but only the front eight feet and the rear four feet thereof, leaving the intervening space unsupported. Accordingly, June 27, 1929, plaintiff again notified defendant to shore the entire wall so that no damage would result to its building or delay plaintiff's work of excavation. Upon defendant refused to comply with the second request, plaintiff undertook the completion of the work, and thereafter brought an action of trespass on the case for the reasonable expenses incurred. Trial by the court without a jury

resulted in a judgment for plaintiff for $3,481.62, from which defendant appeals.

Defendant does not question the necessity for shoring and underpinning the wall as a protection to its building, nor the reasonableness of plaintiff's charges, but predicates its defense solely on the theory that this was a party wall, not from its inception or by reason of any written agreement or statute, but because it had been used jointly as a common wall of separation for so many years that it became a party wall by usage and prescription, and that since the adjoining owner undertook to sink the foundation for the new building lower than the existing wall, it became obligated to protect defendant's right to support in the wall, and save defendant harmless from any expense. This presented an affirmative defense, and it was therefore incumbent on defendant to establish it affirmatively by competent evidence. "The burden of proof is always on the one claiming an easement by adverse enjoyment, not only to show the enjoyment, but that it was adverse, under a claim of title and known to the owner, and that it has been uninterrupted; all of which must be affirmatively shown." (Washburn, Easements and Servitude, 4th ed., p. 151, and cases cited therein.)

In the absence of a written agreement a party wall can become such only by statute or prescription, and defendant does not invoke any statutory authority. Consequently, its claim that this was a party wall must be supported by evidence that a prescriptive right resulted from (1) a user; (2) for the prescriptive period of 20 years; (3) which was adverse and not permissive; (4) open and notorious; (5) under a claim of right; and (6) of which the landowner had knowledge. (Callaghan's Illinois Digest, vol. 5, pp. 4353 et. seq., sec. 11 et. seq.)

Because defendant failed to include the original exhibits or copies thereof in the report of proceedings at the trial, it

resulted in a judgment for plaintiff for $2,[illegible].62, from which defendant appeals.

Defendant does not question the necessity for showing and underpinning the wall as a protection to its building, nor the reasonableness of plaintiff's charges, but predicates its defense solely on the theory that this was a party wall, not from its inception or by reason of any written agreement or statute, but because it had been used jointly as a common wall of separation for so many years that it became a party wall by usage and prescription, and that since the adjoining owner undertook to sink the foundation for the new building lower than the existing wall, it became obligated to protect defendant's right to support in the wall, and save defendant harmless from any expense. This presented an affirmative defense, and it was therefore incumbent on defendant to establish it affirmatively by competent evidence. "The burden of proof is always on the one claiming an easement by adverse enjoyment, not only to show the enjoyment, but that it was adverse, under a claim of title and known to the owner, and that it has been uninterrupted; all of which must be affirmatively shown." (Washburn, Easements and Servitudes, 4th ed., p. 171, and cases cited therein.)

In the absence of a written agreement a party wall can become such only by statute or prescription, and defendant does not invoke any statutory authority. Consequently, its claim that this was a party wall must be supported by evidence that a prescriptive right resulted from (1) a user; (2) for the prescriptive period of 20 years; (3) which was adverse and not permissive; (4) open and notorious; (5) under a claim of right; and (6) of which the landowner had knowledge. (Cullerton's Illinois Digest, vol. 5, pt. 4[?] et. seq., sec. 11 et. seq.)

Because defendant failed to include the original exhibits or copies thereof in the report of proceedings at the trial, it

is somewhat difficult to visualize and understand references by witnesses to the physical characteristics of the wall upon which defendant relies for its contention that it was a party wall. However, certain facts are clearly shown. The wall in question was only eight inches thick. There was a chimney along the wall which defendant's counsel say "protruded all the way down, but apparently part of it had been shaved off;" that "the roof joists and floor joists from the old building went into the wall in question and that there were pockets in the wall where they went in;" that "the wall showed marks of stairways and marks where joists of the building that was torn down had joined this wall;" and that the wall showed holes where joists and pin anchors had been removed. There was also evidence that in years past defendant's building had been enlarged by additions to the front and rear of the original structure and of an extra floor on top. These circumstances are urged as supporting the contention that this was a party wall to which rights were acquired by user for the prescribed period of time. Although these facts indicate that defendant's wall had been used to support the adjoining building, it does not tend to prove that defendant and its predecessors in title had ever relied upon the building to the west for support; nor is there any evidence as to the time when the building to the west of defendant's property was erected, and therefore no showing as to the length of the "user" by defendant. Moreover, there is no indication that the user had been adverse, and for all that appears of record it may have been by mutual agreement of the owners. That the user contended for was not open and notorious is best evidenced by the fact that defendant itself did not know that there was any question of a party wall until it had a survey made of the premises after the building to the west had been torn down, and therefore it could not have made adverse use of the wall under a claim of right. Lastly

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the record fails to disclose that the owner against whom the right is sought had knowledge of the user. Having thus failed to show any agreement for a party wall or user which would give it the right to support, it was incumbent upon defendant to shore and underpin the wall in question when notified to do so, especially in view of plaintiff's evidence that, without shoring and underpinning, even though plaintiff had exercised reasonable care in excavating, defendant's wall would have collapsed, with resultant damage to plaintiff's equipment and possible injury to its workmen engaged in the excavation, and it was therefore necessary for plaintiff to shore and underpin the wall to prevent damage and injury.

Defendant having rested its case on the theory of a party wall by prescription, but having failed to affirmatively establish such defense, the court could not well have done otherwise than enter judgment for plaintiff, and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

the record fails to disclose that the owner against whom the right is sought had knowledge of the user. Having thus failed to show any agreement for a party wall or wall which would give it the right to support, it was incumbent upon defendant to shore and underpin the wall in question when notified to do so, especially in view of plaintiff's evidence that, without shoring and underpinning, even though plaintiff had exercised reasonable care in excavating, defendant's wall would have collapsed, with resultant damage to plaintiff's equipment and possible injury to its workmen engaged in the excavation, and it was therefore necessary for plaintiff to shore and underpin the wall to prevent damage and injury.

Defendant having rested its case on the theory of a party wall by prescription, but having failed to affirmatively establish such defense, the court could not well have done otherwise than enter judgment for plaintiff, and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

42205

STATE OF OHIO, upon the relation of Rodney P. Lien, Superintendent of Banks, in charge of the Liquidation of The Guardian Trust Company, Cleveland, Ohio,
Appellant,

v.

BERNARD SPERO,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

317 I.A. 377

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The State of Ohio, upon the relation of Rodney P. Lien, Superintendent of Banks, in charge of the liquidation of The Guardian Trust Company of Cleveland, Ohio, appeals from an order of the Circuit court sustaining defendant's motion to strike its complaint which sought recovery against defendant upon his alleged promise to answer for the debt of his brother, and dismissing plaintiff's suit.

From the undisputed facts it appears that in 1929 Henry Spero borrowed money from The Guardian Trust Company of Cleveland, Ohio, and entered into other transactions with the bank through which he became indebted to it in the total sum of $1,775, together with interest.

The bank evidently intended to press him for payment of the indebtedness and asked his brother, defendant, for the debtor's address. November 5, 1932, defendant answered the bank's letter as follows:

"In answer to your inquiry of October 25 for the address of my brother, Henry Spero, it is as follows: 11361 S. Irving, Morgan Park, Ill.

"I assume you wish to write him regarding money he owes the bank. In this connection, wish to state he has just recently lost his position and I am sure will be unable at this time to do anything on that matter.

"However, someday he will be in position to pay his debts

4.0.0.5

STATE OF OHIO, upon the relation
of Rodney P. Ilsley, superintendent
of Banks, in charge of the liqui-
dation of the Guardian Trust
Company, Cleveland, Ohio,
Appellee,

v.

BERTRAND BURGO,
Appellee.

Mr. JUSTICE PAUL MATHEWS DELIVERED THE OPINION OF THE COURT.

The State of Ohio, upon the relation of Rodney P. Ilsley, superintendent of Banks, in charge of the liquidation of the Guardian Trust Company of Cleveland, Ohio, appeals from an order of the Circuit Court sustaining defendant's motion to strike its complaint which sought recovery against defendant upon his alleged promise to answer for the debt of his brother, and dismissing plaintiff's suit.

From the undisputed facts it appears that in 1919 Henry Burgo borrowed money from the Guardian Trust Company of Cleveland, Ohio, and entered into other transactions with the bank through which he became indebted to it in the total sum of $1,772, together with interest.

The bank evidently intended to press his for payment of the indebtedness and asked his brother, defendant, for the debtor's address. November 5, 1922, defendant answered the bank's letter as follows:

"In answer to your inquiry of October 25 for the address of my brother, Henry Burgo, it is as follows: 11161 E. Irving, Morgan Park, Ill.

"I assume you wish to write him regarding money he owes the bank. In this connection, wish to state he has just recently lost his position and I am sure will be unable at this time to do anything on that matter.

"However, possibly he will be in position to pay his debts

and the writer assures you he will see to it that this debt is paid, and is sure that pressing him now for this money can not possibly bring any payment, but will so add to his worries that it will only delay getting him back on his feet.

"Do not say this so as to save him any embarrassment, because he owes this money and you are justified in going after it, but there has not been any attempt on his part to defraud - he has merely been the victim of circumstances for the last five years - circumstances outside of his control.

"Someday, he will be straightened around and the Guardian Trust will have that money, but how long that will take, cannot tell."

The sole question presented is whether the foregoing letter can be construed as a promise in writing on the part of defendant to answer for the debt of his brother, under chap. 59, sec. 1, Ill. Rev. Stat. 1941, which reads: "That no action shall be brought, *** whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, *** unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Plaintiff cites cases supporting his contention "that when one binds himself to be responsible for another's debt already made, and of which he has knowledge when he signs, no particular form of words is necessary, excepting that the writing must be so interpreted as to lead anyone of reasonable prudence to construe it as meaning that if the original debtor did not pay the promisor would." However, in all the decisions cited the instrument which was held to constitute a guarantee <u>was written or executed pursuant to a previous request by the creditor for a guarantee</u>. Thus, in <u>Exchange National Bank of Spokane v. Pantages</u>, 74 Wash. 481, 133 Pac. 1025, defendant corporation, of which Alex.Pantages was president, had a matured

and the writer assures you he will see to it that this debt is paid, and is sure that pressing him now for this money can not possibly bring any payment, but will so add to his worries that it will only delay getting his back on his feet.

"Do not say this so as to give him any embarrassment, because he owes this money and you are justified in suing after it, but there has not been any attempt on his part to defraud - he has merely been the victim of circumstances for the last five years - circumstances outside of his control.

"Somehow, he will be straightened around and the Guardian Trust will have that money, but how long that will take, cannot tell."

The sole question presented is whether the foregoing letter can be construed as a promise in writing on the part of defendant to answer for the debt of his brother, under chap. 79, sec. 1, III, Rev. Stat. 1941, which reads: "That no action shall be brought, *** whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, *** unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Plaintiff cites cases supporting his contention "that when one binds himself to be responsible for another's debt already made, and of which he has knowledge when he signs, no particular form of words is necessary, excepting that the writing must be so interpreted as to lead anyone of reasonable prudence to construe it as meaning that if the original debtor did not pay the promisor would." However, in all the decisions cited the instrument which was held to constitute a guarantee was written or executed pursuant to a previous request by the creditor for a guarantee. Thus, in Exchange National Bank of Spokane v. Pantages, 74 Wash. 481, 133 Pac. 1029, defendant corporation, of which Alex.Pantages was president, had a matured

loan with the plaintiff bank which the corporation desired to renew. The bank refused renewal of the indebtedness unless the note made by the corporation was guaranteed by Pantages individually, and the latter thereupon telegraphed an officer of the ~~debtor~~ creditor corporation as follows: "Tell bank I request them to renew the note. Security just as good now as when loan was first made and they are collecting interest on their money. I will arrange things satisfactory to them upon my return to Seattle." The court concluded from these circumstances that "it was clearly the intention of the defendant to guarantee the payment of the note." In Wills v. Ross et al., 77 Ind. 1, it appeared that plaintiff was unwilling to sell any merchandise to the firm of Landers & Wills upon credit. The defendant, who was present, promised that if the plaintiff would sell the goods, "he would be security to them for the payment of the same, and guarantee the payment." In reliance on that promise, plaintiff delivered the merchandise. When the bill remained unpaid defendant wrote the following letter: "Yours at hand, and contents noted. Give John a little more time, and I will see that you get your money." Upon receipt of that letter the debtor was given a six-month extension. The court held, of course, that the provisions of the Statute of Frauds had been complied with, and in the light of the circumstances there shown the letter constituted a guarantee. In Armstrong, Cator & Company v. Snyder et al., 15 Tex. Civ. A. 394, 39 S. W. 379, defendant, pursuant to request of the creditor for a guarantee, wrote a letter saying that "Mrs. Snyder wished for me to endorse a note for balance due you," and said that "I will see that she will remit from time to time until your account is settled." Under these circumstances the court interpreted the writing as a guarantee. Similar facts existed in Stern v. Deutsch, 9 Kans. A. 218, 59 Pac. 687, and Hamlin v. Piser, 163 Ill. App. 51.

In determining whether the letter in the case at bar constitutes a guarantee, the entire instrument must be considered and effect

loan with the plaintiff bank which the corporation desired to renew. The bank refused renewal of the indebtedness unless the note made by the corporation was guaranteed by Hastings individually, and the latter thereupon telegraphed an officer of the creditor corporation as follows: "Tell bank I request them to renew the note. Security just as good now as when loan was first made and they are collecting interest on their money. I will arrange things satisfactory to them upon my return to Seattle." The court concluded from these circumstances that "it was clearly the intention of the defendant to guarantee the payment of the note." In Hills v. Ross et al., 77 Ind. 1, it appeared that plaintiff was unwilling to sell any merchandise to the firm of Landers & Hills upon credit. The defendant, who was present, promised that if the plaintiff would sell the goods, "he would be security to them for the payment of the same, and guarantee the payment." In reliance on that promise, plaintiff delivered the merchandise. When the bill remained unpaid defendant wrote the following letter: "Yours at hand, and contents noted. Give John a little more time, and I will see that you get your money." Upon receipt of that letter the debtor was given a six-month extension. The court held, of course, that the provisions of the statute of frauds had been complied with, and in the light of the circumstances there shown the letter constituted a guarantee. In Bretzman, Cutler & Company v. Snyder et al., 15 Tex. Civ. A. 294, 39 S. W. 272, defendant, pursuant to request of the creditor for a guarantee, wrote a letter saying that "Mr. Snyder wished for me to endorse a note for balance due you," and said that "I will see that she will remit from time to time until your account is settled." Under these circumstances the court interpreted the writing as a guarantee. Similar facts existed in Stern v. Murphy, 2 Dens. A. 218, 39 Pac. 687, and Hamlin v. Place, 161 Ill. App. 51.

In determining whether the letter in the case at bar constitutes a guarantee, the entire instrument must be considered and effect

given to all the language employed. Hopkins v. Schallert, 195 S.W. (Tex. Civ. A.). We think the only reasonable construction of the document under consideration is that defendant "will see to it that this debt is paid" when Henry Spero "will be straightened around" and "the Guardian Trust will have that money, but how long that will take, can not tell." Decisions cited by defendant are generally to the effect that the import of defendant's letter does not constitute a promise to pay. In Williams & Flash Co. v. Carpenter, 32 R. I. 349, 79 Atl. 821, the father of the president of a corporate debtor wrote in part as follows: "Time is what they need and you will get every dollar due you. *** it calls for time which I feel you will agree with me you should grant them under the circumstances if you can be assured you are not to suffer by the delay." In discussing the correspondence that passed between the parties, the court posed the question: "Did the writer thereby intend to guarantee the payment of the claim of the plaintiff?" and answered the inquiry by saying that "He does not say so. He desires to convince the plaintiff of his firm belief that its debtor will protect its interest. But it is important not only to determine what the defendant meant by his letter but also what the plaintiff understood him to mean thereby, and its actions at or about the time of the reception of the letter may speak louder than its words thereafter," and concluded that the letter did not constitute a promise to pay. In Staple v. Vicksburg Waterworks Co., 90 Miss. 848, 44 So. 766, defendant wrote plaintiff as follows: "You call on my brother each Monday morning, and ask him for the amount right there. I would like you to be a little easy on him by making it $15. If he pays a part, draw on me on that day for the balance due for the preceding week; ***." The court held this communication to be "a mere tentative and provisional arrangement, from which we do not think there can be deduced any undertaking on the part of G. W. Staple definitely and

given to all the language employed. Hunting v. Whitlock, 157 S.W. (Tex. Civ. App.). We think the only reasonable construction of the document under consideration is that defendant "will see to it that this debt is paid" when Henry Speck "will be established around" and "the Guardian Trust will have that money, but how long that will take, can not tell." Decisions cited by defendant are generally to the effect that the import of defendant's letter does not constitute a promise to pay. In Hilliard v. Flash Co. v. Jacquette, 32 S. E. 349, 79 Ill. 822, the father of the president of a corporate debtor wrote in part as follows: "Time is what they need and you will get every dollar due you. See it calls for time which I feel you will agree with me you should grant them under the circumstances if you can be assured you are not to suffer by the delay." In discussing the correspondence that passed between the parties, the court posed the question: "Did the writer thereby intend to guarantee the payment of the claim of the plaintiff?" and answered the inquiry by saying that "He does not say so. He desires to convince the plaintiff of his firm belief that his debtor will protect its interest. But it is important not only to determine what the defendant meant by his letter but also what the plaintiff understood him to mean thereby, and its actions at or about the time of the reception of the letter may speak louder than its words thereafter," and concluded that the letter did not constitute a promise to pay. In Ethridge v. Wisebourn Interests Co., 90 Miss. 348, 44 So. 765, defendant wrote plaintiff as follows: "You call on my brother each Monday morning, and ask him for the amount right there. I would like you to be a little easy on him by making it 15%. If he pays a part, draw on me on that day for the balance due for the preceding week;" "The court held this communication to be "a mere tentative and provisional arrangement, from which we do not think there can be deduced any understanding on the part of C. V. Staple definitely and

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certainly to become a guarantor for the indebtedness of the Troy Laundry," and held that the letter did not constitute defendant a guarantor of the debt. In Kenneweg Co. v. Finney, 98 Md. 114, 56 Atl. 482, defendant was sought to be held on a letter written in reply to an inquiry from the buyer concerning the seller, which reads in part: "We are very much interested in seeing that you get the goods, and from the position we occupy we would say that the contract is good, and that we will look after the same, both to your interest and for our own." It was held that this did not constitute guarantee of performance. In Fain Grocery Co. v. Early, 107 S. E. 497 (N.C.), the court had occasion to construe the phrase "any justifiable claims will be taken care of promptly," and held that it was merely a statement of opinion as to the debtor's financial responsibility. Numerous other cases are cited and discussed in Taylor v. First State Bank of Hawley, 178 S. W. 35 (Court of Civil Appeals of Texas), following the conclusions reached in the foregoing decisions cited by defendant. We think the letter in question cannot fairly be construed as anything more than a request that the bank give defendant's brother some additional time in which to pay his debt. Moreover, there is nothing of record to indicate that the bank had accepted defendant's assurance or that it was relying on his letter of November 5, 1932 for payment of the indebtedness. Its letter to defendant merely asked for the debtor's address, evidently for the sole purpose of prosecuting its claim against him. If the bank had relied on defendant's letter for payment of his brother's debt, it would undoubtedly have answered the communication and indicated its intention to hold defendant as a guarantor, but no further correspondence passed between the parties, and we would therefore not be warranted in holding that the bank, after receipt of the letter of November 5, relied on defendant's promise for payment of the indebtedness, without any time limitation.

Defendant also raises the question of a valid consideration.

sufficiently to become a guarantor for the indebtedness of the Troy Laundry," and held that the letter did not constitute defendant a guarantor of the debt. In Lawrence Co. v. Elmore, 98 Ala. 114, 96 Ala. 402, defendant was sought to be held on a letter written in reply to an inquiry from the buyer concerning the seller, which reads in part: "We are very much interested in seeing that you get the goods, and from the position we occupy we could say that the contract is good, and that we will look after the same, both to your interest and for our own." It was held that this did not constitute guarantee of performance. In Klein Brewery Co. v. Daily, 197 S. W. 497 (N.C.), the court had occasion to construe the phrase "any justifiable claims will be taken care of promptly," and held that it was merely a statement of opinion as to the debtor's financial responsibility. Numerous other cases are cited and discussed in Taylor v. First State Bank of Marlay, 178 S. W. 79 (Court of Civil Appeals of Texas), following the conclusions reached in the foregoing decisions cited by defendant. We think the letter in question cannot fairly be construed as anything more than a request that the bank give defendant's brother some additional time in which to pay his debt. However, there is nothing of record to indicate that the bank had accepted defendant's proposal or that it was relying on his letter of November 5, 1927 for payment of the indebtedness. Its letter to defendant merely asked for the debtor's address, evidently for the sole purpose of presenting the claim against him. If the bank had relied on defendant's letter for payment of his brother's debt, it would undoubtedly have answered the communication and indicated its intention to hold defendant as a guarantor, but no further correspondence passed between the parties, and we would therefore not be warranted in holding that the bank, after receipt of the letter of November 5, relied on defendant's promise for payment of the indebtedness, without any time limitation.

Defendant also raises the question of a valid consideration.

He admits that forbearance may constitute a sufficient consideration, but argues that it must be for a reasonably fixed period of time, and there is nothing in the letter at bar which satisfies that requirement.

We are of opinion that the court properly sustained defendant's motion to strike the complaint and ordered the dismissal of plaintiff's suit. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

He admits that forbearance may constitute a sufficient consideration, but argues that it must be for a reasonably fixed period of time, and there is nothing in the letter of May which satisfies that requirement.

We are of opinion that the court properly sustained defendant's motion to strike the complaint and ordered the dismissal of plaintiff's suit. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

41884

STANDARD STATISTICS CO., INC., a corporation,
Appellant,

v.

CHARLES T. DAVIS,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

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317 I.A. 377

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 26, 1939, plaintiff filed a suit to enforce the collection of a promissory note executed by defendant on April 1, 1936. Personal service was had on defendant and on January 5, 1940, plaintiff recovered a judgment by default against him for $701.50. Execution, issued on the judgment, was personally served upon defendant on February 2, 1940, and the sheriff's return recites "no property found and no part satisfied," and that the debtor had filed a debtor's schedule. On November 7, 1940, a supplemental citation was personally served upon defendant but he failed to appear in court. On January 8, 1941, defendant filed a verified motion under section 72 of the Practice Act. Plaintiff filed a motion to strike defendant's motion. On April 30, 1941, the trial court, instead of passing upon plaintiff's motion to strike, entered an order vacating the judgment, and granting defendant leave to file a defense and a counterclaim, and ruling plaintiff to answer said defense and counterclaim within thirty days. Plaintiff appeals from that order.

Defendant's verified motion reads as follows:

"Now comes the defendant, Charles T. Davis, and moves the court to vacate the judgment heretofore entered herein on January 5, 1940 in the sum of Seven Hundred One and 50/100 Dollars and costs and asks leave to file his appearance and affidavit of merits and counterclaim herein and in support of said motion says:

41884

STANDARD STATISTICS CO., INC.,
a corporation,
Appellant,

v.

CHARLES T. DAVIS,
Appellee.

FIRST-TRIAL MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 26, 1939, plaintiff filed a suit to enforce the collection of a promissory note executed by defendant on April 1, 1936. Personal service was had on defendant and on January 5, 1940, plaintiff recovered a judgment by default against him for $701.50. Execution, issued on the judgment, was personally served upon defendant on February 2, 1940, and the sheriff's return reflects "no property found and no part satisfied," and that the debtor had filed a debtor's schedule. On November 7, 1940, a supplemental citation was personally served upon defendant but he failed to appear in court. On January 8, 1941, defendant filed a verified motion under section 72 of the Practice Act. Plaintiff filed a motion to strike defendant's motion. On April 30, 1941, the trial court, instead of passing upon plaintiff's motion to strike, entered an order vacating the judgment, and granting defendant leave to file a defense and a counterclaim, and ruling plaintiff to answer said defense and counterclaim within thirty days. Plaintiff appeals from that order.

Defendant's verified motion reads as follows:

"Now comes the defendant, Charles T. Davis, and moves the court to vacate the judgment heretofore entered herein on January 5, 1940 in the sum of Seven Hundred One and 50/100 Dollars and costs and asks leave to file his appearance and affidavit of merits and counterclaim herein and in support of said motion says:

"That in 1921 this defendant, Charles T. Davis, became a non compos mentis and was so found to be non compos mentis by the court, and that Charles T. Davis continued to be non compos mentis until May of 1940; that this defendant was restored to legal capacity by decree of court entered on to-wit, November 27, 1940, and that this defendant was non compos mentis at the time of the execution of the note involved herein and was non compos mentis at the time of the starting of this suit and at the time of the entry of the judgment herein.

"Wherefore, this defendant prays that the said above mentioned judgment be vacated and set aside and that this defendant be given leave to file his appearance and affidavit of merits and counterclaim herein and that the plaintiff be required to answer said counterclaim, and that this defendant have such other and further relief as to the court shall seem proper.

"Charles T. Davis"

Under the provisions of the Civil Practice Act a motion to strike takes the place of a demurrer as formerly employed and the motion admits all well pleaded allegations of fact in defendant's motion. It does not admit conclusions or inferences drawn by the pleader, and in considering plaintiff's motion to strike, defendant's motion under section 72 is construed most strongly against the pleader.

Plaintiff's motion to strike was based upon the following grounds:

"1. The petition states no cause of action and is incapable of being so amended so as to state a cause of action.

"2. The petition fails to state the name and location of the court which adjudicated said defendant to be an insane person.

"3. The petition fails to state the name and location of the court which restored said defendant to sanity.

"That in 1921 this defendant, Charles T. Davis, became a non compos mentis and was so found to be non compos mentis by the court, and that Charles T. Davis continued to be non compos mentis until May of 1940; that this defendant was restored to legal capacity by decree of court entered on to-wit, November 27, 1940, and that this defendant was non compos mentis at the time of the execution of the note involved herein and was non compos mentis at the time of the starting of this suit and at the time of the entry of the judgment herein.

"Wherefore, this defendant prays that the said above mentioned judgment be vacated and set aside and that this defendant be given leave to file his appearance and affidavit of merits and counterclaim herein and that the plaintiff be required to answer said counterclaim, and that this defendant have such other and further relief as to the court shall seem proper.

"Charles T. Davis"

Under the provisions of the Civil Practice act a motion to strike takes the place of a demurrer as formerly employed and the motion admits all well pleaded allegations of fact in defendant's motion. It does not admit conclusions or inferences drawn by the pleader, and in considering plaintiff's motion to strike, defendant's motion under section 72 is construed most strongly against the pleader.

Plaintiff's motion to strike was based upon the following grounds:

"1. The petition states no cause of action and is incapable of being so amended as to state a cause of action.

"2. The petition fails to state the name and location of the court which adjudicated said defendant to be an insane person.

"3. The petition fails to state the name and location of the court which restored said defendant to sanity.

"4. The petition fails to state the date of the defendant's adjudication as an insane person.

"5. The petition fails to state that the defendant was confined to an asylum or institution for the insane and if so, when he was released therefrom.

"6. The petition fails to state whether said defendant was confined in an asylum at the time he incurred the indebtedness sued upon in this cause and if he was confined in an asylum at the time of service of summons upon him in this action.

"7. The petition fails to state whether the defendant had knowledge of the nature of the plaintiff's suit at the time he was served with a summons.

"8. The petition fails to state why said defendant failed to take steps to have the guardian ad litem appointed to defend said cause of action or why said defendant, if he had knowledge of the pendency of this suit, failed to present a plea of insanity to said cause of action until the filing of his petition herein on the 8th day of January, 1941."

Plaintiff filed in support of its motion to strike an affidavit that sets up at some length certain alleged proceedings under three indictments that were returned against the defendant in February, 1921, in the State of New York. We do not deem it necessary to recite in detail the alleged facts set up in the said affidavit for the reason that the affidavit could not properly be considered in the determination of the motion to strike. Upon the hearing of the motion to strike the trial court allowed defendant to file what purports to be a decree of the Superior court of the County of Los Angeles, State of California, entered November 26, 1940, "In the Matter of the Application of Charles T. Davis to be declared sane and restored to legal capacity." It is hardly necessary to state that this decree should not

"4. The petition fails to state the date of the defendant's adjudication as an insane person.

"5. The petition fails to state that the defendant was confined to an asylum or institution for the insane and if so, when he was released therefrom.

"6. The petition fails to state whether said defendant was confined in an asylum at the time he incurred the indebtedness sued upon in this cause and if he was confined in an asylum at the time of service of summons upon him in this action.

"7. The petition fails to state whether the defendant had knowledge of the nature of the plaintiff's suit at the time he was served with a summons.

"8. The petition fails to state why said defendant failed to take steps to have the guardian ad litem appointed to defend said cause of action or why said defendant, if he had knowledge of the pendency of this suit, failed to present a plea of insanity to said cause of action until the filing of his petition herein on the 8th day of January, 1941."

Plaintiff filed in support of its motion to strike an affidavit that sets up at some length certain alleged proceedings under three indictments that were returned against the defendant in February, 1921, in the State of New York. We do not deem it necessary to recite in detail the alleged facts set up in the said affidavit for the reason that the affidavit could not properly be considered in the determination of the motion to strike. Upon the hearing of the motion to strike the trial court allowed defendant to file what purports to be a decree of the Superior court of the County of Los Angeles, State of California, entered November 26, 1940, "In the Matter of the Application of Charles T. Davis to be declared sane and restored to legal capacity." It is hardly necessary to state that this decree should not

have been admitted nor considered by the trial court in passing upon the motion to strike, but, nevertheless, the trial court stated when he entered the judgment in question that he based his action upon the California decree. Strange as it may seem, the trial court entered no order upon plaintiff's motion to strike and he seems to have proceeded upon the assumption that the cause was at issue, that evidence for both sides had been heard, and that he was warranted in entering a final judgment in the cause. The motion to strike tested the sufficiency of defendant's motion under section 72 and the allegations in defendant's motion could not be aided by evidence offered on the hearing of the motion to strike, and it was the plain duty of the trial court to pass upon the motion to strike instead of entering a final judgment in the cause when the cause was not at issue.

That defendant's motion under section 72 was vulnerable to plaintiff's motion to strike cannot seriously be questioned. Defendant seeks to defend his motion by contending that plaintiff's motion to strike admits that defendant was non compos mentis at the time of the institution of the suit and was non compos mentis at the time of the entry of the judgment in the original suit. Plaintiff's motion to strike, as we have heretofore stated, admits all well pleaded allegations in defendant's motion. What court found defendant non compos mentis? And what were the proceedings and the judgment in that court? What court restored defendant to legal capacity? And what were the proceedings and the judgment in that court? From aught that appears in the allegations of defendant's motion there is nothing from which it would appear that the alleged courts had jurisdiction of the subject matter. The proceedings and the judgment in each of the two alleged causes should have been set up in defendant's motion. Plaintiff strenuously contends that defendant would be unable to allege proceedings in any court wherein he

have been admitted nor considered by the trial court in passing upon the motion to strike, but, nevertheless, the trial court stated when he entered the judgment in question that he based his action upon the California decree. Strange as it may seem, the trial court entered no order upon plaintiff's motion to strike and he seems to have proceeded upon the assumption that the cause was at issue, that evidence for both sides had been heard, and that he was warranted in entering a final judgment in the cause. The motion to strike tested the sufficiency of defendant's motion under section 72 and the allegations in defendant's motion could not be aided by evidence offered on the hearing of the motion to strike, and it was the plain duty of the trial court to pass upon the motion to strike instead of entering a final judgment in the cause when the cause was not at issue.

That defendant's motion under section 72 was vulnerable to plaintiff's motion to strike cannot seriously be questioned. Defendant seeks to defend his motion by contending that plaintiff's motion to strike admits that defendant was non compos mentis at the time of the institution of the suit and was non compos mentis at the time of the entry of the judgment in the original suit. Plaintiff's motion to strike, as we have heretofore stated, admits all well pleaded allegations in defendant's motion. What court found defendant non compos mentis? And what were the proceedings and the judgment in that court? What court restored defendant to legal capacity? And what were the proceedings and the judgment in that court? From aught that appears in the allegations of defendant's motion there is nothing from which it would appear that the alleged courts had jurisdiction of the subject matter. The proceedings and the judgment in each of the two alleged cases should have been set up in defendant's motion. Plaintiff strenuously contends that defendant would be unable to allege proceedings in any court wherein he

was found non compos mentis. The trial court should have sustained the motion to strike.

The judgment order of the Municipal court of Chicago of April 30, 1941, is reversed in toto and the cause is remanded with directions to the trial court to sustain the motion to strike, to allow defendant to file an amended motion if he so desires, and for further proceedings not inconsistent with this opinion.

JUDGMENT ORDER OF APRIL 30, 1941,
REVERSED IN TOTO AND CAUSE REMANDED
WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

was found *non compos mentis*. The trial court should have sustained the motion to strike.

The judgment order of the Municipal court of Chicago of April 30, 1941, is reversed *in toto* and the cause is remanded with directions to the trial court to sustain the motion to strike, to allow defendant to file an amended motion if he so desires, and for further proceedings not inconsistent with this opinion.

JUDGMENT ORDER OF APRIL 30, 1941, REVERSED IN TOTO AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

41921

JOHN WERLIK, ROSE WERLIK, RUDOLPH LUCKSINGER and TILLIE LUCKSINGER, Appellants,	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
v.	Consolidated Under Case No. 39 S 14731
ELLSWORTH MURRAY, Appellee.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Werlik and Rose Werlik, his wife, filed a suit against defendant in the Superior court of Cook county for personal injuries and property damages sustained by them as the result of an automobile accident, alleging that the accident was caused by defendant's negligence. Two other persons, Rudolph Lucksinger and Tillie Lucksinger, his wife, were riding in the Werlik car. They filed a suit against defendant in the Circuit court of Cook county. The two cases were consolidated and tried in the Superior court, before the court and a jury. A verdict of not guilty was rendered as to each plaintiff's claim. Motions for a new trial were overruled and a single judgment was entered on the four verdicts. All of the plaintiffs appeal.

On September 10, 1939, about 8 p. m., plaintiffs were driving from Starved Rock, Illinois, back to Chicago, their home, on Highway 34, in a new Dodge car owned by Mrs. Werlik. Mr. Werlik was driving the car and Mr. Lucksinger was sitting next to him. Mrs. Werlik and Mrs. Lucksinger sat in the back seat. As they were approaching a curve in the road defendant Murray drove his car into the curve from the opposite direction. Defendant was driving a Packard car. There was a crash and the plaintiffs' car was driven into the ditch, where it was found lying upon its side. Defendant's car remained upon the highway. Plaintiffs' theory of fact was that at the time of the accident

41921

JOHN WERLIK, ROSE WERLIK,
RUDOLPH LUCKSINGER and
TILLIE LUCKSINGER,

Appellants,

v.

ELLSWORTH MURRAY,

Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

Consolidated Under Cases
No. 39 & 14921

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Werlik and Rose Werlik, his wife, filed a suit against defendant in the superior court of Cook county for personal injuries and property damages sustained by them as the result of an automobile accident, alleging that the accident was caused by defendant's negligence. Two other persons, Rudolph Lucksinger and Tillie Lucksinger, his wife, were riding in the Werlik car. They filed a suit against defendant in the circuit court of Cook county. The two cases were consolidated and tried in the superior court, before the court and a jury. A verdict of not guilty was rendered as to each plaintiff's claim. Motions for a new trial were overruled and a single judgment was entered on the four verdicts. All of the plaintiffs appeal.

On September 10, 1929, about 8 p. m., plaintiffs were driving from Starved Rock, Illinois, back to Chicago, their home, on Highway 34, in a new Dodge car owned by Mrs. Werlik. Mr. Werlik was driving the car and Mr. Lucksinger was sitting next to him. Mrs. Werlik and Mrs. Lucksinger sat in the back seat. As they were approaching a curve in the road defendant Murray drove his car into the curve from the opposite direction. Defendant was driving a packard car. There was a crash and the plaintiffs' car was driven into the ditch, where it was found lying upon its side. Defendant's car remained upon the highway. Plaintiffs' theory of fact was that at the time of the accident

defendant was driving his car in the wrong lane at a speed of seventy miles an hour and that he drove his car head-on into the side of the car operated by Mr. Werlik. The theory of defendant was that he was driving on the right side of the road at about twenty-five miles an hour; that the car driven by Werlik was on the wrong side of the road at the time of the accident and was being driven around the curve at a speed in excess of forty miles an hour; that defendant applied his brakes as soon as he saw that plaintiff was on the wrong side of the road and that the negligence of Werlik was alone responsible for the accident.

When the motions for a new trial were called the trial court refused to allow plaintiffs' counsel to be heard upon the motions and stated to counsel that he was on his "way to Michigan Avenue."

Plaintiffs strenuously contend that the verdicts of the jury are contrary to the manifest weight of the evidence. After a painstaking examination of the entire evidence that bears upon the instant contention, we are convinced that the contention is a meritorious one. As we read the record, it would amount to a miscarriage of justice to permit the judgment to stand. In our opinion the ability and adroitness of defendant's counsel unduly influenced the jury in reaching its verdicts. As the cases will in all probability be tried again we refrain from commenting upon the evidence.

The judgment of the Superior court of Cook county is reversed and the consolidated cases are remanded for a new trial.

JUDGMENT REVERSED AND CONSOLIDATED
CASES REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

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When the motions for a new trial were called the trial court refused to allow plaintiffs' counsel to be heard upon the motions and stated to counsel that he was on his "way to Michigan Avenue."

Plaintiffs strenuously contend that the verdicts of the jury are contrary to the manifest weight of the evidence. After a painstaking examination of the entire evidence that bears upon the instant contention, we are convinced that the contention is a meritorious one. As we read the record, it would amount to a miscarriage of justice to permit the judgment to stand. In our opinion the ability and adroitness of defendant's counsel unduly influenced the jury in reaching its verdicts. As the cases will in all probability be tried again we refrain from commenting upon the evidence.

The judgment of the Superior court of Cook county is reversed and the consolidated cases are remanded for a new trial.

JUDGMENT REVERSED AND CONSOLIDATED
CASES REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

41998

MARY ROARK,
Appellee,

v.

EDDIE ROARK,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

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317 Ill. 378

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 23, 1937, Mary Roark, hereinafter called appellee, filed her complaint against her husband, Eddie Roark, hereinafter called appellant, in which she alleged that he had been guilty of cruelty and she prayed for a divorce, for alimony, etc. Appellant was represented in the divorce proceedings by Attorney Meyer H. Goldstein, who filed appellant's answer to the complaint. A stipulation was then signed by the attorneys for both parties "that the above entitled cause be set down for hearing on Complaint and Answer as in case of default." The case came on for hearing before Judge Finnegan on October 1, 1937, appellant being represented by his said attorney. From the transcript of the evidence it appears that the parties agreed in open court that the household goods and furniture should be the property of appellee and that appellant should pay her $5.50 weekly as alimony, and $150 for her attorney's fees. A decree of divorce was then entered, which contained, inter alia, the following: "It Is Further Ordered, Adjudged and Decreed that the defendant pay to the plaintiff, as and for support and maintenance, the sum of Five Dollars and Fifty cents each week, beginning instanter and until the further order of this court." Under this provision of the decree appellant paid $5.50 per week alimony for three years. The decree was approved upon its face by the attorneys for both parties. On February 28, 1941, appellant, by Ellis & Westbrooks, his attorneys, filed a "Petition for Modification of the Decree of Divorce Heretofore

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[illegible]

[illegible]

Entered." The petition alleges, inter alia, that appellant's circumstances and conditions have changed and that he is no longer able to comply with the alimony order "unless he himself is to be deprived of the necessities of life and to be put to great hardship and inconvenience;" that the circumstances and conditions of appellee have changed since the entry of the decree and that she is no longer in need of the assistance and help of appellant. The petition further alleges that appellee, through her attorney, represented to the court at the time of the trial of the divorce proceedings that appellant had entered into an agreement with her by which he promised or agreed to pay her the sum of $5.50 for her support and maintenance and that the court entered the alimony order upon said representation but that appellant did not enter into such agreement and did not know that the order was incorporated into the decree until his attorney notified him after the case was heard. The petitioner prayed that the alimony order be vacated, or in the alternative be modified. Appellee filed an answer to the petition in which she alleged, inter alia, that the order for $5.50 per week for alimony was entered "with the consent and recommendation of counsel then appearing for the petitioner." The answer further alleged that on two previous occasions, May 24, 1939, and June 15, 1939, appellant had requested Judge Finnegan to reduce or modify the alimony order but that his petition was refused upon each occasion; that appellant has threatened that unless she agreed to modify the alimony order or accept a lump sum settlement "she would never get any money from him regularly and what little she would receive would be at such times as would not permit the respondent to make fullest use of such sums;" that she has been compelled heretofore to obtain a rule upon appellant to show cause why he should not be held in contempt before she succeeded in compelling appellant to obey the order of the court as to alimony. Appellee denied that she has an income sufficient

Instead." The petition alleges, inter alia, that appellant's circumstances and conditions have changed and that he is no longer able to supply with the alimony payments, failing in that he is to be employed at the minimum of life and to be put to great hardship and inconvenience; that the circumstances and conditions of appellee have changed since the entry of the decree and that she is no longer in need of the assistance and help of appellant. The petition further alleges that appellee, through her attorney, represented to the court at the time of the trial of the divorce proceedings that appellant had entered into an agreement with her by which he promised or agreed to pay for the use of [illegible] for her support and maintenance and that the court relying the alimony order upon such representation but that appellant did not enter into such agreement and did not know that the order was incorporated into the decree until his attorney notified him after the order was issued. The petitioner prayed that the alimony order be vacated, or in the alternative be modified. Appellee filed an answer to the petition in which she alleged, inter alia, that the order for $[illegible] per week for alimony was entered with the consent and recommendation of counsel being appointed for the petitioner." The answer further alleged that on the pretrial conference, July 24, 1939, and June 15, 1939, appellant had requested Judge Flanagan to reduce or modify the alimony order but that his petition was refused upon such recommendation that appellant has intentionally failed and refused to comply with the alimony order or accept a job for the entire week "she would never get any money from him regardless and what little she would receive would be at such times as would put great hardship upon the respondent in order fulfill her of such money" that she has been compelled heretofore to obtain a rule upon appellant to show cause why he should not be held in contempt before she succeeded in compelling appellant to pay the order of the court as to alimony. Appellee denies that she has an income sufficient

to sustain her without the help of appellant. The petition came on for hearing before Judge Harrington, who heard the testimony offered by both parties and entered an order reducing the alimony to five dollars a week. Appellant appeals from that order.

Appellant contends that "the provision in the decree for permanent alimony should not have been entered, is erroneous and void and should be reversed by this Court for the following reasons:" (a) The complaint for divorce did not pray specifically for permanent alimony and there is no general prayer for relief, and therefore the court that heard the divorce proceedings had no jurisdiction to grant alimony. (b) The proof heard did not support the order for alimony. (c) Appellant did not agree to the permanent alimony allowed, and the court was induced to believe that he did so agree, and therefore there was a misrepresentation practiced upon the court. (d) Acts of condonation appear in the certificate of evidence. (e) Appellant surrendered his right to contest the divorce suit without any consideration, he paid the costs of the suit and appellee's solicitor's fees, and he contributed to appellee's support for about four years since the entry of the decree, and therefore the permanent alimony provision in the decree should be vacated. Appellant's counsel have seen fit to treat the instant appeal as though it were an appeal from the original decree; they have also treated the instant motion as though it were a pleading in the nature of a bill of review. No motion was made within thirty days after the entry of the divorce decree to vacate or modify the same and the trial court was powerless to change the provisions in the decree as to alimony unless by agreement of the parties or unless one of the parties filed a petition setting up that there had been a change in the conditions of the parties subsequent to the entry of the decretal order. (Joslyn v. Joslyn, 315 Ill. App. 160, 177, 178.) Other cases to the same effect might be cited if it were necessary. Therefore, upon the

to analysis but without the help of appellant. The petition was on file including before Judge Dorsey, who heard the testimony offered by both parties and ordered an order requiring the defendant to file dollars a week. Appellant appeals from this order.

Appellant contends that the provision in the decree for permanent alimony should not have been entered, in proceedings and void and should be reversed by this Court for the following reasons: (a) The application for divorce did not pray specifically for permanent alimony and there is no general prayer for relief, and therefore the court that heard the divorce proceedings had no jurisdiction to grant alimony. (b) The power based his not support the order for alimony. (c) Appellant did not agree to the permanent alimony allowed, and the court was induced to believe that he did so agree, and therefore there was a misrepresentation practiced upon the court. (d) Acts of abandonment appear in the certificate of evidence. (e) Appellant surrendered his right to conduct the divorce suit without any consideration, by paid the costs of the suit and appellee's solicitor's fees, and he acquiesced to appellee's request for short time plans the entry of the decree, and therefore the permanent alimony provision in the decree should be vacated.

Appellee's counsel have done all in their the learned appellant as though it were an appeal from the original decree; they have also treated the instant motion as though it were a pleading in the nature of a bill of review. No motion was made within thirty days after the entry of the divorce decree to vacate or modify the case and the total time was permitted to change the provisions in the decree as to alimony unless by agreement of the parties or unless one of the parties filed a petition setting up that there had been a change in the conditions of the parties subsequent to the entry of the decree. (Jordan v. Jordan, 115 Ill. App. 184, 177, 178.) Other cases to the same effect might be added if it were necessary. Therefore, upon the

hearing of the instant petition the trial court could only vacate or modify the decretal order for alimony upon due showing of changed circumstances of one or both of the parties. The only question before us is, Was the order entered by the trial court justified under the evidence? After a careful reading of the evidence bearing upon the question we are satisfied that appellant has no just grounds to complain of the order entered by the trial court.

Appellee has made a motion in this court to dismiss the appeal, which motion was reserved to hearing. The motion is denied.

The instant appeal is without the slightest merit and the order of the Circuit court of Cook county is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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hearing of the lower petition the trial court could only vacate or modify the decree for alimony upon the showing of changed circumstances of one or both of the parties. The only question before us is, has the order entered by the trial court justified under the evidence. After a careful reading of the evidence bearing upon the question we are satisfied that appellant has not just grounds to complain of the order entered by the trial court.

Appellee has made a motion in this court to dismiss the appeal, which motion was reserved to hearing. The motion is denied.

The instant appeal is without the slightest merit and the order of the lower court of this county is affirmed.

DONE AFFIRMED.

Smithson, P. J., and Tidwell, J., concur.

42014

EDWARD J. CLANCY, Appellant,	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
v.	)	
PHYLLIS M. CLANCY, Appellee.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Edward J. Clancy, filed a complaint for divorce against Phyllis M. Clancy on grounds of desertion. She filed a cross-complaint for separate maintenance. The trial judge dismissed plaintiff's complaint and awarded cross-plaintiff a decree for separate maintenance, also granted her custody of the minor child of the parties, and awarded her support money and attorney's fees. Plaintiff appeals.

Plaintiff's complaint alleges that cross-plaintiff wilfully deserted him, without reasonable cause, on April 30, 1939. Her answer denies that she wilfully deserted plaintiff without any reasonable cause, and denies that plaintiff is entitled to relief.

Cross-plaintiff's counterclaim alleges, inter alia:

"4. That during the time she and plaintiff cohabited as husband and wife, she faithfully discharged all her duties as such wife, and at all times treated plaintiff with kindness and forbearance, but plaintiff, a few months after said marriage, commenced a course of unkind, cruel and inhuman conduct toward her, which continued until she finally separated from him on, to-wit, April 30, 1939, since which time she has lived separate and apart from plaintiff.

"5. That plaintiff is a man of violent passion and ungovernable temper, that on many occasions, he addressed to her the most opprobrious epithets and threats of personal violence, and has repeatedly threatened to take her life, as more particularly hereinafter set forth, that shortly after said marriage, plaintiff

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"5. That plaintiff is a man of violent passion and ungovernable temper, that on many occasions, he addressed to her the most opprobrious epithets and threats of personal violence, and has repeatedly threatened to take her life, as more particularly hereinafter set forth, that shortly after said marriage, plaintiff

commenced the excessive use of intoxicating liquors, that he has been on sprees and remained in an intoxicated condition for a long period of time, that while he is thus intoxicated he is very quarrelsome and ill-treats his family, using abusive language, and in consequence of the cruel and inhuman treatment and threats aforesaid, and such conduct as to render it unsafe for her to live with or remain near him, she was obliged on April 30, 1939, to leave the house of plaintiff, and since which time she has not dared to return to plaintiff's house, or live with him.

"6. That more particularly in April 1933, shortly after Phyllis Mary was born, plaintiff came home in an intoxicated condition, and threatened to take the said Phyllis Mary away with him, that he used the most obscene and abusive language, and only when it appeared to plaintiff that the police would be called did he desist in his said threat.

"7. That in the months of October and November, 1935, immediately prior to the birth of their said daughter, Carol, plaintiff would follow defendant about the house, smashing dishes at her feet, and as a result several pieces of said dishes cut her about the face and body, and because of her physical condition her health was greatly impaired.

"8. That immediately following the birth of their said daughter, Carol, in January 1936, plaintiff remained in an intoxicated condition almost continuously, that while so intoxicated, he became and was very quarrelsome, using abusive language and rendering defendant's condition intolerable, and her life burdensome.

"9. That on Christmas eve of 1937, plaintiff came home in an intoxicated condition, and used obscene and abusive language and then left their home, and did not return until the following day.

"10. That on several occasions in the year 1938, plaintiff

commenced the excessive use of intoxicating liquors, that he has been on sprees and remained in an intoxicated condition for a long period of time, that while he is thus intoxicated he is very quarrelsome and ill-treats his family, using abusive language, and in consequence of the cruel and inhuman treatment and threats aforesaid, and such conduct as to render it unsafe for her to live with or remain near him, she was obliged on April 30, 1939, to leave the house of plaintiff, and since which time she has not dared to return to plaintiff's house, or live with him.

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"8. That immediately following the birth of their said daughter, Carol, in January 1936, plaintiff remained in an intoxicated condition almost continuously, that while so intoxicated, he became and was very quarrelsome, using abusive language and rendering defendant's condition intolerable, and her life burdensome.

"9. That on Christmas eve of 1937, plaintiff came home in an intoxicated condition, and used obscene and abusive language and then left their home, and did not return until the following day.

"10. That on several occasions in the year 1938, plaintiff

followed defendant about the house with a gun, his practice being that he would sit down in the room defendant was in, and lay the gun along side of him in an exposed condition, and when defendant left said room plaintiff would follow her into the room she then occupied and go through the same procedure.

"11. That in the month of July or August 1938, plaintiff while in an intoxicated condition forced defendant, and their oldest child, Phyllis Mary in the night time to leave the house of plaintiff and locked all of the doors, so that she was unable to return to his house, that it was necessary for her to go to the home of her father and remain there for the night.

"12. That in September 1938, plaintiff came home in an intoxicated condition and threatened to commit suicide, and in furtherance of said threat, locked himself in his automobile, closing all of the windows, and it became necessary to call the fire department to prevent him from carrying out his said threat.

"13. That on October 3, 1938, in the evening while in an intoxicated condition, plaintiff pulled a gun from his pocket and pointed it at defendant, and threatened to kill her, that he returned the gun to his pocket and left the house, and failed to return for the balance of the night, that in consequence of such cruel and inhuman treatment and threats aforesaid and such conduct as to render it unsafe for her to live with or remain near plaintiff, she was obliged, on said October 3, 1938, to leave the house of defendant; that on October 5, 1938, plaintiff came to the house and moved his clothing and other belongings, and made his abode elsewhere, and thereupon defendant returned to his house, and made her abode.

"14. That on November 4, 1938, their said child, Carol, died and plaintiff moved his belongings back to the house where he continued to live until April 30, 1939.

"15. That on April 30, 1939, defendant was obliged to leave the house of plaintiff, and seek refuge elsewhere, since which time

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"15. That on April 30, 1939, defendant was obliged to leave the house of plaintiff, and seek refuge elsewhere, since which time

she has not dared to return to defendant's house, or live with him."

The amended answer of plaintiff to the counterclaim denies the charges alleged in the counterclaim and alleges "that the defendant resided with and cohabited with this plaintiff from November, 1938, until April 30, 1939, and the alleged offenses charged by the defendant against this plaintiff were all fully condoned."

Plaintiff claims that "the defendant left the plaintiff with no valid reason for doing so, but merely because she ceased to love him. Plaintiff was a devoted husband and father, and was not guilty of the misconduct charged against him by the defendant. If he had been guilty of any misconduct, it was condoned by the defendant resuming marital cohabitation with him after the last act charged against the plaintiff. He had always been a good husband, but after the resumption of marital relations on November 4, 1938 he was an exemplary husband. When the defendant left him April 30, 1939, he offered to go back to her over a hundred times. It was her duty to accept this offer." Plaintiff contends that the decree is against the manifest weight of the evidence, that the court erred in not finding that he was entitled to relief under his complaint, and further erred in finding for cross-plaintiff upon her counterclaim.

Cross-plaintiff claims that plaintiff was a hard drinking man and was very often under the influence of liquor; that when he was in that condition he was not a kind and affectionate husband but was abusive and quarrelsome and made her life miserable and intolerable by acts of cruelty; that his offenses were not condoned by her, but that even if they were, his subsequent conduct revoked the condonation; that she was fully justified in leaving plaintiff and that she is living separate from plaintiff without fault on her part. Cross-plaintiff contends that the decree is fully supported by the evidence.

The parties were married January 30, 1932, and lived together

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The parties were married January 30, 1932, and lived together

until April 30, 1939. Two children were born to them, Phyllis Mary and Carol. Carol died November 4, 1938. Plaintiff has been a policeman for fourteen years. At the time of the trial he was thirty-six years of age.

This case was tried by an able, careful and conscientious judge. After the trial court had denied plaintiff relief and had granted relief to the cross-plaintiff, counsel for plaintiff asked the court if he made any special finding of intoxication against plaintiff, and the court responded that he made no special finding that plaintiff was "an habitual drunkard and intoxicated person." As we understand the court's position he was of the opinion that acts of plaintiff, aside from his drinking habits, warranted cross-plaintiff in leaving him, and therefore it was not necessary for the court to hold that plaintiff was an habitual drunkard. Counsel for plaintiff emphasizes this statement of the court and even goes so far as to state that it was a finding by the trial court that plaintiff was not guilty of intoxication during the time that he lived with his wife. The court did not, and could not, under the evidence, make such a finding. As we read the record plaintiff constantly drank excessively, and this habit was the primary cause in bringing about a separation of the parties. Cross-plaintiff testified that her husband "was all right when he was sober," and we are of the opinion that plaintiff, sober, is a decent man and an affectionate husband, and that the acts cross-plaintiff charges against him were due to his overindulgence in liquor. The testimony for cross-plaintiff, some of which we do not refer to, tends strongly to prove that plaintiff was an habitual drunkard. While plaintiff and his witnesses testified that he was never intoxicated, nevertheless, their testimony also shows that he was a steady drinker, who "carried his liquor well." The testimony of Austin E. Regan, an old friend of plaintiff and a witness for him, throws considerable light upon the instant subject. Mr. Regan often drank with plaintiff.

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He testified that as long as he had known plaintiff the latter had been a drinking man; that in his opinion plaintiff "could hold his liquor;" that in all their drinking together he had never seen plaintiff arrive at a point where he could not hold his liquor; that he had never seen him stagger; that he never saw him intoxicated "according to my understanding of the term;" that when plaintiff was drinking beer the witness had seen him drink as many as twenty glasses; that if plaintiff was drinking whiskey he had seen him drink as many as eight glasses; that witness also had "drunk that many glasses."

It would unduly lengthen this opinion to refer to all of cross-plaintiff's testimony in regard to plaintiff's drinking habits. We will refer to the principal incidents of which she complains: She testified that in October or November, 1935, immediately prior to the birth of Carol, she was under a doctor's care; that she was visiting her mother; that plaintiff was to come there for dinner but that he did not show up and they had dinner without him; that plaintiff came there at eight or nine o'clock; that somebody drove him there; that "he was very drunk. He couldn't walk straight;" that she met him at the door and they got into their car and she drove it; that when they reached 81st and Halsted streets on the way home he wanted to get out and get some cigarettes; that as there was a tavern near there that he visited quite frequently she got out of the car and went to the drug store and got cigarettes; that when they reached home her husband discovered that the cigarettes were not cork tipped and he started arguing, quarreling and calling her all kinds of names; that she was pregnant at the time and got very excited; that "he went into the pantry, got some dishes and followed me into the bedroom throwing the dishes on the floor. The pieces flew up, hit me in the face. Then I went to the telephone, called my mother and asked her to please come out and get me;" that her mother came, and told plaintiff that it was very wrong

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for him to act that way because of his wife's condition and that she thought it would be best for cross-plaintiff and Phyllis Mary to go home with her; that cross-plaintiff then went to her father's home and stayed there for five days; that when the dishes fell the chips went up in the air and hit her in the face and she was bruised, but that she was ashamed to show them to anybody; that when she went to her father's home she was in bed two days with a terrific headache from the bruises and was under the doctor's care as she was carrying her child at the time. The witness further testified that plaintiff telephoned her and asked her to meet him downtown, that he wanted her to come back to him; that she told him she could not live with him because of the way he was carrying on with his drink; that her life was in danger; that he then promised to take the pledge and they went to St. Peter's church, where he took the pledge not to drink for a year; that he drank again in less than two weeks' time; that Carol was born in January, 1936; that in the spring Carol was very sick and upon one occasion cross-plaintiff stayed up most of the night with her; that plaintiff did not come home that night although he was working days at that time; that plaintiff, when he reached his home, fell asleep in the car; that the man across the street rang the door bell to tell her he was out there in the car; that she went out and tried to get him upstairs; that his sister, Elizabeth Clancy, came along to see how the baby was and found plaintiff in the car with the lights lit and the engine running; that it was then about eight o'clock in the morning. It is significant that while plaintiff called his sister Elizabeth to testify that he had lived separate and apart from cross-plaintiff for a period of one year immediately preceding the filing of his complaint, she was not interrogated in reference to the last mentioned incident, nor was she asked any questions as to plaintiff's drinking habits. Cross-plaintiff further testified that on Christmas eve, 1937, plaintiff failed to come home to put up the Christmas tree and that she and the Regans put up the

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tree; that when plaintiff finally came home he was in an intoxicated condition and was carrying eight or ten pies; that when she asked him where he had been he got very angry and started to swear; that he dumped the pies down, went out, and did not return until about 7:30 or 8 o'clock Christmas morning; that she stayed up all night. The witness further testified that in the summer of 1938 plaintiff came home at ten or eleven o'clock in an intoxicated condition and started to argue and he followed her around the house with a gun; that if she was in the living room he would sit down in that room with the gun lying on a table that was alongside of him; that if she went into the kitchen he would follow her there; that he knew that she was "deathly afraid of the gun;" that she picked up the gun and hid it; that plaintiff looked all over the place for the gun and then started another argument and asked her where the gun was; that he talked so loudly that Phyllis Mary woke up and called for her mother; that she and Phyllis Mary ran into the hallway and plaintiff slammed the door and locked them out; that she and the child got into the car and she drove to the home of plaintiff's sister, where she left Phyllis Mary; that she then went back to her home and sat in the car outside of the house; that she tried to get into the house several times but was unable to do so, so she drove to her father's home and he telephoned Mr. Baker, plaintiff's brother-in-law, and she and her mother drove to 55th street, where they met Mr. Baker, who was a policeman, and they went to the home of the parties and Mr. Baker tried to get in at the front door, but could not; that he banged on the doors and knocked on the windows but was unable to awaken plaintiff; that the lights were lit in the house and the front windows were open; that she then went to her parents' home and in the morning she went to her own home, rang the door bell, and plaintiff let her in; that he said he was very sorry for what had happened; that during the entire time that she was locked out Carol, the baby, was in the house. The witness further testified that in September, 1938, plain-

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tiff came home intoxicated and threatened to commit suicide; that he went out to where the car was parked in front of the house, got into the car, closed the windows, locked the doors, and started the motor; that she got excited and called the fire department and that it was so long in coming that she ran to the man upstairs and told him what had happened and in the meantime the fire department came; that plaintiff saw them coming and got out of the car; that the firemen came into the house, and while they were using the telephone plaintiff said to her, "You think you are so smart. I will show you, calling the Fire Department. I will take the car, have a collision, a smash-up, smash the car and get killed, and it will appear as an accident;" that that evening plaintiff became very angry because the car would not go over five miles an hour and said that he "was going into the bedroom and blow his brains out and I could clean up the mess." The witness further testified that in October, 1938, Mrs. Regan and her daughter Katherine were at the home, and plaintiff, who had been drinking, came home and while she was sitting on the couch plaintiff "pulled a gun," and the Regans ran out of the house; that a few minutes later the Regans came back and Mrs. Regan said to plaintiff that she was surprised that he would do anything like that, to which he answered, "You know I wouldn't do anything like that;" that shortly afterward he left the house and did not come back until the following morning; that she took her baby and went to the Hayes hotel, leaving Phyllis Mary with the Regans; that two days later, at the request of plaintiff, she went home and had a conversation with him; that she told him that her life was in danger because of the way he was acting and that it was impossible for her to live with him; that if he wanted to stay in the apartment she would have to go to some other place; that he said he would take his things away, which he did, and he went to his sister's, and cross-plaintiff returned to the apartment; that her husband remained away from the apartment until Carol died, on November 4; that while Carol "was

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being waked" he moved his things back into the apartment and stayed there until April 30; that between November 4 and April 30 he continued to drink; that the lease was up at that time and she told him that "it was impossible to live that way" and that she was going to get an apartment for herself and Phyllis Mary; that plaintiff said that his sisters wanted to know what he was going to do because they were going to rent a smaller apartment if he was not going to live with them, that he would give $75 a month for the support of herself and Phyllis Mary; that she moved on April 30; that just before that day he told her that he had rented an apartment and was moving the furniture in there, that "I have a home there for you. If you don't go to it you are out of luck;" that plaintiff then had liquor in him. Upon cross-examination the witness testified that her husband struck her upon two occasions, the first time when they were living at 1739 80th street and the second time when they were living at 75th and Carpenter streets, which was shortly before they separated the first time, in the summer of 1937. In response to a question put to cross-plaintiff by the court she testified: "Right after my daughter died, in fact, the day she was buried, my other little girl came down with pneumonia. She was very, very ill. Q. When was this? A. My daughter was buried on the seventh of November, seventh or eighth, and that night Phyllis Mary came down with pneumonia. The doctor had to be called. I took care of that child, didn't have my clothes off for a week. It was either two or three nights after she was taken sick, nine or nine-thirty, Mr. Clancy said he was going for cigarettes and a glass of beer. He went out, left me with that child sick and never came back until the next morning, seven-thirty. I asked him where he had been. He said, 'I was out having innocent fun. Certainly a man is entitled to that.'"

As to the dish-breaking incident, plaintiff testified that he and his wife "had a heavy argument;" that his wife told him that

being waked" he moved his things back into the apartment and stayed there until April 30; that between November 4 and April 30 he continued to drink; that the lease was up at that time and she told him that "it was impossible to live that way" and that she was going to get an apartment for herself and Phyllis Mary; that plaintiff said that his sisters wanted to know what he was going to do because they were going to rent a smaller apartment if he was not going to live with them; that he would give $75 a month for the support of herself and Phyllis Mary; that she moved on April 30; that just before that day he told her that he had rented an apartment and was moving the furniture in there, that "I have a home there for you. If you don't go to it you are out of luck;" that plaintiff then had liquor in him. Upon cross-examination the witness testified that her husband struck her upon two occasions, the first time when they were living at 1739 80th street and the second time when they were living at 75th and Carpenter streets, which was shortly before they separated the first time, in the summer of 1937. In response to a question put to cross-plaintiff by the court she testified: "Right after my daughter died, in fact, the day she was buried, my other little girl came down with pneumonia. She was very, very ill. Q. When was this? A. My daughter was buried on the seventh of November, seventh or eighth, and that night Phyllis Mary came down with pneumonia. The doctor had to be called. I took care of that child, didn't have my clothes off for a week. It was either two or three nights after she was taken sick, mine or nineteen thirty, Mr. Clancy said he was going for cigarettes and a glass of beer. He went out, left me with that child sick and never came back until the next morning, seven-thirty. I asked him where he had been. He said, 'I was out having innocent fun. Certainly a man is entitled to that.'"

As to the dish-breaking incident, plaintiff testified that he and his wife "had a heavy argument;" that his wife told him that

he was the type of person that would break the dishes and that he said to her, "Why don't you dare me to," and that he broke them "to accommodate her;" that she was not cut or bruised as a result of the incident; that he was not drunk at the time but that he had had "something to drink" and that he took two drinks after he got home; that his wife was pregnant at the time and was "pretty sore" about being in that condition. As to the pledge incident, plaintiff testified that he agreed with his wife that it would be a good idea if he stopped drinking liquor and stayed on beer; that he promised her to stop drinking hard liquor; that they went to St. Peter's church and he took the pledge "to abstain from drinking hard liquor;" that it is not a fact that he did not keep that pledge. We find no specific denial by plaintiff of cross-plaintiff's testimony that in the spring of 1936 it was necessary for her to stay up all night with the sick child, Carol, and that her husband did not come home that night. As to the Christmas eve, 1937, incident, plaintiff testified that he did not come home in an intoxicated condition, but that he did bring home eight pies; that two were for the Regans, two for his own home, and four for his sisters; that there was nothing unusual about his bringing home pies; that his wife did not stay up all night and wait for him; that he came home shortly before midnight but his wife would not let him in and he went down to the basement and slept there; that his wife had the chain and bolt on the door so that he could not use his key to get into the home; that his wife knew that he went down in the basement and had to sleep on a chair. As to the gun incident in the summer of 1938, plaintiff denied <u>in toto</u> the testimony of cross-plaintiff as to that incident. He further denied that in the month of July or August, 1938, he forced his wife and Phyllis Mary to leave the house in the night time and locked them out. He testified that on one occasion he pulled his gun out of the holster and offered it to his wife "to shoot me because she said she was leaving me." Mrs. Katherine Regan, a witness for plaintiff, testified that

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upon one occasion plaintiff and cross-plaintiff had an argument and plaintiff "drew a gun and offered it to her to kill him;" that he said, "If you are going to leave me, I don't want to live;" that her daughter Katherine was with her at the time and when plaintiff drew the gun and offered it to cross-plaintiff to kill him they got frightened and left; that afterward plaintiff said to her, "You never saw me draw a gun," to which she answered, "Yes you did draw a gun." As to the fire department incident plaintiff testified that he never went into the car on the street and locked the doors and threatened to commit suicide by carbon monoxide gas; that the fire department came to the house in March of the same year; that he does not know why they came; that the firemen said, "What is wrong here? Somebody is supposed to be committing suicide;" that he said, "Where?" that they said, "Somebody is supposed to be sitting in a car;" that he said to the firemen that there must be some mistake, and he invited them in to have a drink, which they refused; that the firemen said they received a call that somebody was going to commit suicide; that he thought there was a fire in the house and he opened the door and let the firemen into the house. Plaintiff further testified that on a Christmas eve his wife told him that she was going to leave him and thereupon he "threatened to commit suicide with that same gun;" that he said to her, "I might as well go in and do the fadeout act because I don't want to live without her. I went in the bathroom and closed the door, but it was against my religion and scruples, so I came out." Katherine Regan testified that she remembered when the fire department came to the Clancy home; that her telephone rang and Mrs. Clancy told her that her husband was threatening to take his life; that she, the witness, did not wait to get dressed but put on a robe and slippers and went to the Clancy home; that meanwhile the police arrived and she asked them what was wrong and they said, "Everything was okay, he just was a little drunk, I guess;" that

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~~that~~ the fire department was in front of the home and plaintiff was in the kitchen offering the firemen a drink; that plaintiff "wasn't drunk, by any means;" that she had seen him when he had liquor on his breath but that she had never seen him when he was intoxicated "and lost control of his walk and could not walk straight." Plaintiff further testified that he had "never been intoxicated in the course of my married life."

The trial court found that the "testimony of the plaintiff and cross-defendant, Edward Clancy, alone is sufficient to prove such conduct on his part as would warrant the defendant and cross-plaintiff in absenting herself from him." We are in full accord with that finding. Counsel for plaintiff realize, apparently, that it is somewhat difficult for them to argue that the court's finding was not supported by the evidence, and they strenuously argue that "any offense the plaintiff may have committed prior to November 4, 1938, was condoned by the defendant," and that after the condonation there was no active misconduct on the part of plaintiff that would nullify the effect of the condonement. Both parties agree that after the death of Carol and while her body was still in the home, plaintiff returned to the home and lived there until April 30, 1939. The alleged condonement is based upon plaintiff's testimony that in December, 1938, he had sexual relations with his wife, although he "had to fight with her a little bit;" that that was the only time he had such relationship during the period in question. He further testified that during that period he lived at home, ate his meals there, and there were no quarrels of any kind between him and his wife. Cross-plaintiff testified that her husband attempted to have sexual relations with her upon one occasion, in December, 1938, but that he did not succeed; that thereafter he did not attempt to have relationship with her. The trial court was of the opinion that it was probable that there was intercourse at the time in question between the parties. We believe cross-plaintiff's

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testimony in regard to the incident. Condonation is an affirmative defense and the burden was upon plaintiff to establish such defense by a preponderance of the evidence. (See Klekamp v. Klekamp, 275 Ill. 98, 103. See, also, Lipe v. Lipe, 327 Ill. 39, 42.) We do not think that plaintiff successfully sustained the burden. It is also the law that condonation of the wife's offense by the husband is a stricter bar against the procuring of a divorce than is condonation by the wife of the husband's offense, inasmuch as she may find it difficult to quit the domicile and often submits through necessity, and hence condonation on the part of the wife is not pressed with the same vigor as condonation on the part of the husband. (Duberstein v. Duberstein, 171 Ill. 133; Coonce v. Coonce, 296 Ill. 585, 591; Gilliam v. Gilliam, 254 Ill. App. 606 (Abst.); Doose v. Doose, 198 Ill. App. 387, 392.) In any event, the trial court found that the subsequent conduct of plaintiff revoked the forgiveness and revived the former offenses. We are impressed with the truth of an answer made by cross-plaintiff to a question put to her by the trial court as to what happened between November, 1938, and April 30, 1939. Cross-plaintiff stated: "I thought that after Carol died and Mr. Clancy moved back into the house that maybe he was going to change and things could be fixed between us and we could go on for the sake of Phyllis Mary. But that showed he didn't change his way of living. From then on he spent most of his time at the Regans'. He came home and couldn't wait to get out and go across the street to their house. I would have the meals cooked, ready for him. He wouldn't call to say he wasn't coming home. Then at Christmas he had a chance to be off at Christmas or New Year's. I asked him to take the Christmas Day off. He said no, he wanted to take New Year's Day off. He said his sister wanted us to come for dinner. I said my mother wanted us to come to her house. I said we would stay home for dinner and after dinner I could go to my mother and he could go to his sister's . I asked him if he could

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be home at two o'clock for dinner, and he said yes, he could. I cooked a big turkey dinner and put it on the table. It was three o'clock and he wasn't home yet. I called at the office and they said he had been gone for a long time. So a quarter after three I left and went to my mother's. I don't know what time he got home. From then on it was the same thing. He would come sometimes for his meals, sometimes he wouldn't. That was no home life. When he was home he would lay on the couch and sleep, never could have any conversation with him about anything. When I saw things going on like that, I thought there was no sense in having a home for Phyllis Mary under those conditions. I thought she would be better off with just the two of us, where there was at least peace. The Court: Any questions? Mr. Friedman [attorney for plaintiff]: No. I take it you are interested as a third party." Cross-plaintiff knew when she made this statement to the court that plaintiff was pleading condonement, and if she had been willing to swear falsely it would have been an easy matter for her to testify that he came home drunk upon a number of occasions and that he was guilty of acts of cruelty toward her, but she did not so testify. It is not true, as plaintiff argues, that her testimony shows that plaintiff was not drinking during that period of time. During the cross-examination of the witness the following occurred: "Q. He was sober almost all that time, wasn't he? A. I wouldn't call him sober, he was still drinking. Q. But he wasn't intoxicated and never abused you during that period of time? A. No." The witness further testified that while defendant was not exactly intoxicated on April 28 or 29, "he did have liquor in him," and she further testified that she told him in April "that the way he was going, drinking, and hadn't promised to live any other way," that she could not go on living that way.

What is condonation? "Condonation, in the law of divorce, is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated and that the offender shall thereafter

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What is condonation? "Condonation, in the law of divorce, is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated and that the offender shall thereafter

treat the forgiving party with conjugal kindness. (Sharp v. Sharp, 116 Ill. 509; Farnham v. Farnham, 73 id. 497; Davis v. Davis, 19 id. 334.) Although condonation implies a condition which will permit the original charge to be considered in connection with a subsequent offense against the marital relation, the later misconduct must amount to more than slight acts of coldness or unkindness or mere quarreling. (Abbot v. Abbot, 192 Ill. 439.) While the facts of each particular case must be considered upon the question whether the former grievance is revived by the subsequent conduct of the offending party, yet it is not necessary that the misconduct succeeding condonation shall be of the same class or character as that condoned, or, standing alone, shall be sufficient to form an independent ground for divorce. The injured spouse has a right to judge of the future by the past, and the court will connect the whole of the unfaithful partner's conduct in order to reach a correct conclusion. Sharp v. Sharp, supra; Farnham v. Farnham, supra, 2 Schouler on Marriage, Divorce, Separation and Domestic Relations, (6th ed.) sec. 1704; Davis v. Davis, supra." (Young v. Young, 323 Ill. 608, 613, 614.)

Even if it be assumed that the parties, in December, had sexual intercourse, nevertheless, we are satisfied that the trial court was justified in finding that thereafter plaintiff did not treat his wife with conjugal kindness. The mother was then grieving over the recent loss of her baby and it was a time for plaintiff to show special consideration and affection toward his wife. Plaintiff insisted, upon the witness stand, that he loved his wife and that since the separation he had asked her more than a hundred times to return to him. But it is he, not his wife, who asks for a divorce. It may well be that when plaintiff shows that he is able to lead a sober life there is a chance that this couple may be reunited. Calling upon his wife daily while she was in the hospital, after the separation, when "there was liquor on his breath every time he came," does

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not indicate that he is making a serious effort to lead a sober life.

After a careful examination of the record in this case we are satisfied that the decree of the Superior court of Cook county is a just one and it is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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v.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
MARCELLA GRAFFE, also known as Orcello Z. Graffe, Appellant.	)	

317 I.A. 379

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On October 31, 1941, plaintiff, Samuel J. Graffe, was granted a decree of divorce upon his amended complaint, and the counterclaim of defendant, Marcella Graffe, for separate maintenance was dismissed for want of equity. She appeals.

As we have reached the conclusion that there has been a miscarriage of justice in this case we deem it advisable to make a full statement of the pleadings and the facts adduced upon the hearing.

On May 7, 1940, Graffe, hereinafter called plaintiff, filed a verified complaint for divorce against his wife, Marcella Graffe, in which he alleged that the parties were married on July 22, 1932, and that they lived and cohabited together until February 27, 1939; that he conducted himself as a kind and affectionate husband toward her; that defendant on February 27, 1939, "wilfully and intentionally and without any reasonable cause brought the cohabitation to an end by misconduct, which rendered the continuance of the marital relations so unbearable that the plaintiff herein was forced to leave his home on February 28, 1939, and that the said acts of the defendant herein were such as justified the plaintiff herein in leaving. * * * That this forced desertion on the part of the defendant has persisted for the space of one year and upwards and yet continues," and plaintiff prayed that he be granted a divorce. Defendant filed an answer, which alleges that plaintiff did not conduct himself toward her as a true,

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kind and affectionate husband, and denies that she "wilfully and intentionally and without any reasonable cause, brought the cohabitation to an end by misconduct and such misconduct rendering the continuance of the marital relations so unbearable that the plaintiff was forced to leave his home on February 28, 1939." The answer further alleges that the allegations in plaintiff's complaint are insufficient at law to constitute a cause for divorce, that they are mere conclusions, and she reserves the right to move to strike the complaint for insufficiency at law. Defendant also filed a counterclaim, in which she alleged that she lived and cohabited with plaintiff until March 4, 1939; that she always conducted herself toward her husband as a true, loving and affectionate wife and was at all times ready, willing and able to perform her marital duties; that plaintiff disregarded his marital duties and persisted in unethical and disgraceful conduct toward her; that he has "continuously and persistently indulged in matters and things so unethical and disgraceful that this counterclaimant is impelled, because of proper decency and due respect to the Court, to refrain from alleging same herein;" that on March 4, 1939, without any fault, cause or reason on her part and on mere whim and caprice of plaintiff he wilfully deserted and absented himself from her for more than one year and at no time has he made any effort to return, although she has often entreated him to do so; that "the counter-defendant consistently and continuously has lived separate and apart and wilfully and wrongfully, without the fault of the counter-claimant, refused to cohabit with the counter-claimant as husband and wife;" that such desertion continues; that he, prior to the said desertion and thereafter, committed adultery with one Mary Doe; that plaintiff has failed to support her and that he has ignored the order of the Court of Domestic Relations that he pay her five dollars per week for her support and that he is now in arrears in the sum of

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ninety dollars; that he has made several attempts against her life "and has used every trick, artifice, connivance and contrivance conceivable by the so called abuse of legal process to have the counter-claimant committed to the insane asylum, but without any success, and he is now endeavoring and uses every possible and thinkable method to so have counter-claimant committed to the insane asylum;" that she is destitute and without means of support, and that she has been depending upon her friends for support and is about to become a public charge; that she is unable to pay counsel to represent her; that plaintiff is an able-bodied man and earns forty to fifty dollars per week, and she prays for a decree of separate maintenance and for an order for her support and maintenance and that attorney's fees and costs be allowed her. Plaintiff's verified answer to the counterclaim denies that he lived with his wife until March 4, 1939; denies that she was a true and affectionate wife; denies that he was guilty of unethical and disgraceful conduct; denies that he deserted her on March 4, 1939, and alleges that he left his wife on February 27, 1939, "for causes justifying him in bringing the co-habitation to an end;" denies that he was guilty of adultery; admits that the Court of Domestic Relations required him to pay five dollars a week for the support of his wife; denies that he threatened her life; denies that he earns forty to fifty dollars per week, and prays that the counterclaim be dismissed.

On July 1, 1940, Judge Desort referred to a special commissioner defendant's motion to strike plaintiff's complaint and he ordered the commissioner to take testimony as to the financial responsibility of plaintiff. On October 24, 1940, the commissioner filed a report, in which he recommended that defendant be permitted to withdraw her answer to the complaint and to file a motion to strike the complaint, as the complaint is insufficient at law and states no statutory grounds for divorce. The commissioner reported that he was unable to hear testimony as to the financial responsibility of plaintiff

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for the reason that plaintiff's attorney refused to allow plaintiff to testify. On December 6, 1940, Judge Desort entered an order approving the report of the special commissioner and ordering plaintiff to pay defendant fifty dollars for her attorney's fees and further ordering plaintiff to pay defendant the sum of twelve dollars per week as temporary alimony. This order was O.K'd by plaintiff's attorney. Subsequently several orders were entered finding plaintiff guilty of wilful contempt of court for his failure to pay defendant the fifty dollars for her attorney's fees and for failure to pay the temporary alimony to cross-plaintiff. On August 26, 1941, Judge Lindsay entered an order finding that there was due defendant from plaintiff $375 for her support and maintenance under the order entered October 24, 1940; also finding that plaintiff had not answered the rule that was entered against him and that he was guilty of wilful contempt of court for failure to pay the said sum and the sheriff was ordered to take the body of plaintiff into custody and hold him until he was discharged by due process of law. On September 5, 1941, Judge Desort entered a like order to the one entered by Judge Lindsay. On October 8, 1941, Judge Desort granted a motion of plaintiff's attorney that all motions then pending before him be transferred to Judge Nelson "to be disposed of contemporaneously with the hearing of said merits of said cause on October 22, 1941." On October 14, 1941, Judge Nelson entered an order that plaintiff be allowed to file an amended complaint, which alleges that plaintiff always conducted himself as a good husband and that on February 24, 1939, defendant, without any reasonable cause or justification, "did leave and absent herself and did desert the plaintiff and counterdefendant from their home * * * and did persist and continue in said desertion for the space of one year * * * and has persisted and continued in such desertion to the present time;" that on February 24, 1939, she turned on the radio to such an advanced and tremendous volume of tone that

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it was impossible for plaintiff to sleep, and that he "did request and appeal" to her to desist in the playing of the radio for the reason that he was employed nights and could not obtain his sleep, but that she ignored his request "and he did temporarily leave their home on February 24, 1939, and spent the day sleeping elsewhere;" that on February 25, 1939, he returned to his home and found defendant had taken a certain number of clothes and personal articles "and did desert and absent herself from their home;" that on February 25, 1939, defendant, without justification or provocation, obtained a warrant for his arrest on a charge of assault and battery and had a warrant served on him; that when the case was heard in the Municipal court the judge of that court ordered plaintiff to "be required to move from that address where he had lived and he was compelled thereby to reside at a different address;" that in the early part of March, 1939, defendant came to plaintiff's place of employment and delivered to him all his clothes and personal effects "and instructed him not to return to his former home which she again began to occupy." The complaint prayed for a decree of divorce. Defendant filed an answer to the amended complaint in which she denies that she deserted plaintiff; denies that they separated on February 24, 1939, and avers that plaintiff wilfully and without just cause deserted her on March 4, 1939. The answer further alleges that the amended complaint is insufficient at law and that defendant reserves the right to make a motion to strike it.

The following is the substance of the testimony offered by plaintiff: He testified that he was married to defendant on June 22, 1932; that they lived together as husband and wife until February 24, 1939; that at that time he was working as a night bartender at the Club Marathon; that his hours were from 10 p.m. until 8 a.m.; that when he came home on the morning of February 24 his wife "started playing the radio as loud as she could;" that he went to bed; that she got out the ironing board and started ironing clothes

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and that because of the noise he could not sleep; that he got up and shut off the radio and she put it on again; that he said, "Listen, I work ten hours a night and I have got to get some sleep;" that she said, "Who cares;" that he said, "I will put on my clothes and sleep somewhere where I can get some rest;" that he got up and put on his clothes; that she stood in the door as he started to leave but he pushed her away and went out and slept at a hotel that day; that he came home about 6:30 or 7 o'clock that evening and she was not at home; that he ate and went back to work; that the next morning when he got home she was not there, and the following morning she was not there; that on March 1 he was arrested on a charge of disorderly conduct brought by his wife; that on March 2 he went to court, where he saw his wife for the first time since February 24; that the judge told him to stay away from his wife; that that night she came to the tavern where he was working and said to him, "Here are the balance of your clothes," and "you stay out," and she left with him two shopping bags full of clothes; that he did not say anything to her as there were fifty or sixty people in the place; that between February 24 and the first day he went to court he lived at home but that she did not; that the judge said to him, "You stay away from her;" that at the time she left the bags of clothes with him she also said to him, "I am through;" that about a year after the separation he was standing on the corner of Clark and Huron streets, when his wife came up to him and said, "Where is my money," to which he answered, "I haven't got any money;" that she then put her hand in her purse and she had a little pen knife about that big (indicating) and was going to cut my face with it; that nothing happened because he grabbed the knife away from her, and a couple of days later he went to the police station and got a warrant and she was arrested, but that he did not prosecute the case and was not present when the case was called for trial. The witness also testified that while the salary scale for

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The witness also testified that while the salary scale for

~~[illegible] bartenders was thirty-five dollars a week his income during~~ the last five months was twenty dollars a week regular pay and a few dollars extra; that in February, 1941, during the pendency of the instant suit, he met his wife on the street one day and said to her, "Why don't you quit that [working in a tavern] and see if we can't get together somehow;" that she said she would not, that all she wanted was her alimony; that he always treated his wife the best that any man could; that he did not give his wife any cause to leave him. During the direct examination of plaintiff the following occurred: "Q. Did you ever conduct or have any interest or share in the proceeds of any house of ill-fame? A. No, I don't know of any. I did not. * * * Q. Did you have any interest in such a line of prostitution or in any prostitution or in shares of the proceeds? * * * A. Not to my knowledge." Upon cross-examination he testified that some of his wife's clothes were still in the apartment on March 1; that he did not go back to his home after March 1 because the judge told him to stay away from there; that after March 1 his wife lived in the apartment for six weeks or two months but that he did not go back to see her; that on March 10 his wife brought proceedings for non-support and that the judge ordered him to pay her five dollars a week. (A Municipal court record introduced in evidence shows that on March 10, 1939, Judge Graber found plaintiff guilty of the criminal offense of non-support of wife and ordered him to pay five dollars per week for her support.) Plaintiff admitted that in April, 1927, he was convicted, under the name of Sam Graffi, of counterfeiting, in the United States District Court, and that he served three years in the United States Penitentiary at Leavenworth, Kansas, for the offense; that on July 14, 1936, in the United States District Court, he was convicted in two cases of "peddling narcotics" and that he was sen-

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tenced to serve a year and a day in the penitentiary at Leavenworth in each case, the two sentences to run concurrently; that he was indicted and convicted under the name of Samuel J. Graffy. The records show that plaintiff pleaded guilty to each of the three indictments. The indictments in the narcotics cases charge the sale of a derivative of opium. The witness further testified that he was working for Babette, at 446 South State street, as a bartender; that on March 7, 1939, his wife came into the Club Marathon "and raised hell in there about wanting more money."

Plaintiff called George Schmidt as a witness, who testified that he knew plaintiff well but that he did not know defendant; that in the early part of March, 1939, he was in the Club Marathon, a tavern; that plaintiff was behind the bar; that defendant walked in with two packages and threw them on the floor and said, "Here is the rest of your clothes, I am through," and she turned around and walked out; that plaintiff was "dumfounded" and said nothing. Upon cross-examination he testified that occasionally he worked as an extra waiter at the Club Marathon but that he was not working there at the time in question; that he was an old friend of plaintiff. The only other witness called by plaintiff was Ernest E. Schaeffer, who testified that plaintiff lived at 1512 North LaSalle street the latter part of 1939 and all of 1940; that defendant did not live there.

Plaintiff then rested, and counsel for defendant moved to dismiss the complaint for divorce for want of equity, which motion was denied after the court refused the counsel an opportunity to argue the motion.

In her own behalf, defendant testified that she had lived in Chicago for at least thirty years; that after her marriage to plaintiff, on June 22, 1932, she lived and cohabited with him; that on March 4, 1939, her husband came in with the Tribune and showed her a headline that Judge Finnegan said it was all right to hit your

tenced to serve a year and a day in the penitentiary at Leavenworth in each case, the two sentences to run concurrently; that he was indicted and convicted under the name of Samuel L. Greffy. The records show that plaintiff pleaded guilty to each of the three indictments. The indictments in the narcotics cases charge the sale of a derivative of opium. The witness further testified that he was working for Babette, at 446 South State street, as a bartender; that on March 7, 1939, his wife came into the Club Marathon "and raised hell in there about wanting more money."

Plaintiff called George Schmidt as a witness, who testified that he knew plaintiff well but that he did not know defendant; that in the early part of March, 1939, he was in the Club Marathon, a tavern; that plaintiff was behind the bar; that defendant walked in with two packages and threw them on the floor and said, "Here is the rest of your clothes, I am through," and she turned around and walked out; that plaintiff was "dumfounded" and said nothing. Upon cross-examination he testified that occasionally he worked as an extra waiter at the Club Marathon but that he was not working there at the time in question; that he was an old friend of plaintiff. The only other witness called by plaintiff was Ernest E. Schaeffer, who testified that plaintiff lived at 1912 North LaSalle street the latter part of 1939 and all of 1940; that defendant did not live there.

Plaintiff then rested, and counsel for defendant moved to dismiss the complaint for divorce for want of equity, which motion was denied after the court refused the counsel an opportunity to argue the motion.

In her own behalf, defendant testified that she had lived in Chicago for at least thirty years; that after her marriage to plaintiff, on June 22, 1932, she lived and cohabited with him; that on March 4, 1939, her husband came in with the Tribune and showed her a headline that Judge Finnegan said it was all right to hit your

wife, and that her husband hit her over the head with the newspaper and said, "Go downtown and get a divorce and I will pay for it;" that the next day her husband took away all his clothes and took them to the Marathon; that her husband left while she was going to the grocery store; that her husband was working as a bartender at the Marathon Club and the next day she called him on the telephone and "told him to come on back, that we were adult people, we had been through too much trouble already and he said, 'I will do what I like about it.' He had a younger woman. Q. Was that all that was said? A. Well, I was crying so, I do not remember, probably more things were said;" that she talked to her husband many times; that she was given the address of the place where he was living, 733 North LaSalle Street, and she "went there and asked for the woman's name," and the landlady showed her the register and she saw on the register, "Sandy Morgan and wife;" that the writing, "Sandy Morgan and wife," was in her husband's handwriting; that she went up to the apartment, No. 8, and pushed the door open and she saw "a woman in a house coat and Mr. Graffe were on the bed in the act of intercourse and when he saw me, he ran out and I took his watch and ring and I went back and talked to the landlady;" that two days afterward her husband told her he wanted his watch and ring and she said to him, "What about this woman?" that she further said, "Sam, you are making a mistake, the woman is all right, you told her you wasn't married;" that she further said to him, "Come back;" that he answered that "after he gets through doing some things and making a lot of money, he will be back, he can make a lot of money off of that woman;" that for two weeks after her husband left the home she continued to live there; that she paid the rent for the two weeks (here the witness produced a receipt for the two weeks' rent); that she lived continuously in the home until March 21 or March 22; that her husband never came to the home during that period although she requested him to come

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home; that her husband lived with her until March 5; that he did not leave her between February 24 and March 5; that she never left him during their married life and that she waited for him while he was in prison; (At this point her counsel attempted to show by the witness that she had sent money orders to her husband while he was in prison but the court erroneously sustained the objection to the offer.) that they always lived happily together until she found out about "this woman." The witness further testified that Judge Graber did not tell her husband to stay away from his home; that the judge said to her husband: "'You men who try to come in here and try to get rid of your wives, you pay her this support money and pay her some today,' and that's all;" that Judge Weiss did not tell her husband to stay away from his home; that he stated to her husband, "Why don't you support your wife," and her husband said, "I will give her ten dollars right now," and he got ten dollars from the owner of the Marathon Club and gave it to her. The witness further stated that she has been living alone since March 5, 1939; that she has no income; that she is not working; that she spends all her time in courts; that she never asked her husband for $25,000; that her husband has never asked her to come back; that she has asked her husband a good many times to come back; that on March 2, 1939, she did not bring her husband his clothes at the Marathon Club; that she was not at the Marathon Club on that date. Upon cross-examination the witness stated that her husband had never asked her to come back; that he did not leave his home on February 24; that they did not have a radio in their home. During the cross-examination the following occurred: "Q. And would you say he was mistaken when he stated that you came to the place of employment of Mr. Graffe on March 2nd, 1939 and threw two bags containing clothes down and saying, 'I am through,' would you say he was mistaken? A. I would not call it mistaken, I would say he lied." The witness then testi-

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fied that on the day when she found her husband and the woman in bed in the hotel they were both drunk; that her husband took his hat and coat and ran out of the back door; that she introduced herself to the woman. The trial court unduly limited the direct examination of defendant. This concluded the evidence. Counsel for defendant stated to the court that he had tried to subpoena the landlady of the hotel but that she was out of town. The trial court stated that he had made efforts to bring about a reconciliation or a mutual settlement of the cause; that both of the parties "have been pretty much engaged in life outside of the pale of the law." Counsel for defendant called the attention of the court to the fact that there was no evidence to warrant the court's statement as to defendant. The court stated that he did not think there was a chance of the parties ever living together again; that he had tried to effect a settlement and that it was immaterial to him who got the divorce but that plaintiff had presented evidence which justified the court in giving him a decree of divorce and that "the counter-complaint has not been justified at all." Counsel for defendant stated to the court that he had received nothing for his services in the cause.

There is no theory of fact or law upon which the decree for divorce can be justified in this cause. We are unable to understand why the court gave any credence to the testimony of plaintiff as to what brought about the separation of this couple. Upon his own admissions and upon the records introduced in evidence he plead guilty to the charge of counterfeiting in the United States District Court and served three years in the United States penitentiary at Leavenworth, Kansas, for that offense. A fortiori, he plead guilty in the United States District Court to two charges of selling narcotics and served a year and a day in the penitentiary at Leavenworth for the offense. He testified that he was convicted

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in these two last cases of "peddling narcotics." It is a matter of common knowledge that there is no more depraved or unconscionable criminal than the man who peddles narcotics to the unfortunates who are addicted to the use of the same. Sec. 1, chap. 51, Ill. Rev. Stat. 1941, provides: "That no person shall be disqualified as a witness in any civil action * * * by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence." In Keehn v. Braubach, 107 Ill. App. 339, 362, 363, we said: "This being a civil case the fact of the conviction may be proved like any fact not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence. (Bailey v. Beall, 251 Ill. 577, 585.)" See, also, Gage v. Eddy, 167 Ill. 102, 108, 109, where the court said: "The conviction for crime, when offered as impeaching evidence at common law, could only be proved by offering the record of conviction and identifying the witness as the convicted person. The above section authorized other methods of showing such conviction as impeaching testimony. The ruling of the court in the two cases above stated was, that there could be no proof offered except the record of a conviction for crime. In this there was error. The testimony of this witness was material and important." Other cases to the same effect might be cited if it were necessary. In plaintiff's verified original complaint he alleged that he was forced to desert his home because the misconduct of defendant rendered the continuance of the marital relations unbearable. In his verified answer to the counterclaim he alleges that he left his wife on February 27, 1939, "for causes

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justifying him in bringing the co-habitation to an end." But in the verified amended complaint, filed over seventeen months after the original complaint was filed, he alleges that he lived and cohabitated with his wife until February 24, 1939, when she deserted him and persisted and continued such desertion "to the present time." The special commissioner appointed by Judge Desort reported to the court that the complaint was insufficient at law and stated no statutory grounds for divorce, hence the change in plaintiff's theory of fact as to how the separation came about. His verified original complaint and his verified answer to the defendant's counterclaim show the falsity of plaintiff's testimony that his wife deserted him and the home. While we are satisfied that defendant spoke the truth when she testified that plaintiff, without just cause, deserted her and has persisted in the desertion notwithstanding her many pleas to him that he return, we are also satisfied that plaintiff's own testimony did not sustain his charge that defendant deserted him without just cause. The pleadings of both parties and their testimony make it clear that the parties lived together as husband and wife until the latter part of February, 1939, or the early part of March, 1939. Plaintiff admits that on February 24, 1939, his wife stood in the doorway and tried to prevent him from leaving and that he pushed her away and left. Defendant denies that the alleged incident of that date happened and states that they had no radio in the apartment. During the entire time the parties lived together the only trouble or dispute of which plaintiff complains is the alleged incident of February 24. Such a trivial incident, even if it happened, could not justify him in deserting his wife and home. For aught that appears in his testimony defendant was a virtuous, sober, affectionate wife, and never caused him any trouble until February 24, 1939. It is plain that some other cause than the alleged incident of that date brought about the separation of the parties. Plaintiff admits that some of his wife's clothes were still

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in the apartment when he left on March 1; that he knew that his wife was living in the apartment for two months after he left and that he did not go there to see her. That she paid for the rent of the apartment for some time after he left is not disputed. It is significant that after he left the home he made no effort to resume the marital relationship and that he does not deny her testimony that she asked him a good many times to come back and that he refused to do so. He did testify that in February, 1941, he met his wife upon the street and said to her, "Why don't you quit that [working in a tavern] and see if we can't get together somehow," and that she said she would not and that all she wanted was her alimony. Defendant testified that her husband never asked her to come back, and one cannot read the evidence without coming to the fixed conclusion that after he left her he never desired nor intended to go back to her. The fact that she waited for him while he was in prison is a strong circumstance in favor of her testimony that she desired her husband to come back to her. The fact that plaintiff, although he was able to support his wife, fought every attempt to make him support her is a circumstance tending to show that he was trying to starve her into granting him a divorce, and in this connection it must be noted that he was found guilty of the criminal offense of non-support of his wife. When the court announced that a decree of divorce would be granted plaintiff, the latter's attorney immediately stated that the amount due defendant would be paid. We entertain no reasonable doubt that had the wife asked for a divorce plaintiff would not have defended the counterclaim. We disbelieve plaintiff's testimony as to the cause and manner of the separation, and we believe defendant's testimony that she and her husband always lived happily together until she found out about "this woman," and that plaintiff, without just cause, deserted her. While the wisdom of her desire and hope that the marital relationship be restored might be

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questioned, her right, under the law and the evidence, to demand that no decree of divorce be entered in this cause cannot be questioned. Counsel for plaintiff contends that only plaintiff and defendant testified as to what brought about the separation of the parties; that the trial court believed the testimony of plaintiff, and that under such circumstances the Appellate court will not disturb the finding of the trial court in that regard. Akin v. Nolan, 202 Ill. App. 157, is cited in support of this contention. An abstract opinion was filed in that case, but it sufficiently appears that neither of the parties was an habitual criminal. However, it is not the law that we are bound by the finding of the trial court because only plaintiff and defendant testified as to the cause of the separation.

Plaintiff contends that the testimony of the witness Schmidt corroborates plaintiff's testimony that defendant came to the Marathon Club, threw down two shopping bags containing his clothes, and told him that she was "through." It is a sufficient answer to this contention to say that we believe defendant's testimony that the testimony of plaintiff and Schmidt in reference to that alleged incident is false.

We hold that the granting of a divorce to plaintiff in this case is so unwarranted under the facts and the law that it amounts to a miscarriage of justice. We further hold that what we have just said applies with equal force to the action of the trial judge in denying defendant a decree for separate maintenance.

The decree of the Superior court of Cook county entered October 31, 1941, so far as it grants a divorce to plaintiff and dismisses defendant's counterclaim for separate maintenance for want of equity, is reversed, and the cause is remanded with directions to the trial court to enter a decree dismissing plaintiff's amended complaint for want of equity and granting a decree of separate maintenance to defendant upon her counterclaim, and for further proceedings in the matter of the additional amount to be allowed her for her support and solicitor's fees.

DECREE ENTERED OCTOBER 31, 1941,
REVERSED IN PART AND CAUSE REMANDED
WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

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Sullivan, P. J., and Friend, J., concur.

42226

BURTON R. ABRAMS,
Appellant,

v.

BERG'S MARKET & LIQUOR STORE,
a copartnership,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

317 I.A. 380

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for attorney's fees under the Attorney's Lien Statute. The trial court sustained defendant's motion to strike plaintiff's amended statement of claim and plaintiff electing to stand on the statement an order was entered dismissing plaintiff's action at his costs.

Plaintiff's amended statement of claim is as follows:

"1. That he is an attorney duly licensed to practice law in the State of Illinois and that he has been actively engaged in the practice of law in the City of Chicago and State of Illinois since the year 1935.

"2. That on May 5, 1941, one Evelyn Smith, also known as Evelyn Singleton, mother and natural guardian of LeRoy Smith, a minor, deceased, entered into a written contract, a copy of which is hereto attached, and by special reference incorporated herein as Exhibit 'A', employing the plaintiff as her attorney to represent her in a certain claim for the wrongful death of said minor on or about May 2, 1941, due, as it was claimed, to the negligence of the defendant co-partnership.

"3. That the said Evelyn Smith, also known as Evelyn Singleton, was the sole beneficiary and heir at law of the deceased minor, said minor having been born out of wedlock.

"4. That by the terms of said contract of employment with the mother of the minor, it was agreed that the said Evelyn Smith, also known as Evelyn Singleton, would pay as

BURTON R. ADAMS,
Appellant,

v.

BERG'S MARKET & BROWN STORE,
a copartnership,
Appellee.

) APPEAL FROM MUNICIPAL
) COURT OF CHICAGO.

MR. JUSTICE SCHALAK DELIVERED THE OPINION OF THE COURT.

An action for attorney's fees under the attorney's lien statute. The trial court sustained defendant's motion to strike plaintiff's amended statement of claim and plaintiff declining to stand on the statement an order was entered dismissing plaintiff's action at his costs.

Plaintiff's amended statement of claim is as follows:

"1. That he is an attorney duly licensed to practice law in the State of Illinois and that he has been actively engaged in the practice of law in the City of Chicago and state of Illinois since the year 1923.

"2. That on May 7, 1941, one Evelyn Smith, also known as Evelyn Singleton, mother and natural guardian of Nedoy Smith, a minor, deceased, entered into a written contract, a copy of which is hereto attached, and by special reference incorporated herein as Exhibit 'A', employing the plaintiff as her attorney to represent her in a certain claim for the wrongful death of said minor on or about May 2, 1941, due, as it was claimed, to the negligence of the defendant co-partnership.

"3. That the said Evelyn Smith, also known as Evelyn Singleton, was the sole beneficiary and heir at law of the deceased minor, said minor having been born out of wedlock.

"4. That by the terms of said contract of employment with the mother of the minor, it was agreed that the said Evelyn Smith, also known as Evelyn Singleton, would pay as

compensation for plaintiff's legal services a sum of money equal to twenty-five per cent of any amount realized from said claim by settlement or thirty-three and one-third per cent by judgment.

"5. That, pursuant to the Statute * * *, plaintiff caused to be served upon the defendant co-partnership by registered mail a Notice of Attorney's Lien, a copy of which is hereto attached and by special reference incorporated herein as Exhibit 'B'. That by the terms of said Attorney's Lien Notice, plaintiff claimed a lien of one-third of any amount that may be recovered by suit or settlement.

"6. That upon being so engaged by the mother of the deceased minor, plaintiff investigated the claim, interviewed witnesses, caused photographs of the premises to be taken, which were taken on May 8, 1941, made a complete investigation of the law with reference to the liability of the defendant onpartnership for causing the death of the minor, inspected the minutes of the coroner's inquest and performed other and further legal services in the prosecution of said claim.

"7. That on July 9, 1941, the plaintiff conferred with the insurer of the defendant co-partnership and was then and there informed that the claim had been settled with the administrator of the estate of the said minor, deceased, for the sum of Five Hundred and no/100 dollars.

"8. That under and by virtue of the Notice of Attorney's Lien, heretofore set forth, and of which the defendant co-partnership long prior to the settlement had full notice, the plaintiff is entitled to have of and from the said defendant co-partnership the sum of One Hundred Sixty-Six and 66/100 Dollars; for which amount plaintiff prays for judgment."

"Exhibit 'A'

"Chicago, Ill. 5/5/41

"I hereby retain and employ Burton R. Abrams attorney to

compensation for plaintiff's legal services a sum of money equal to twenty-five per cent of any amount realized from said claim by settlement or thirty-three and one-third per cent by judgment.

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"6. That upon being so engaged by the mother of the deceased minor, plaintiff investigated the claim, interviewed witnesses, caused photographs of the premises to be taken, which were taken on May 8, 1941, made a complete investigation of the law with reference to the liability of the defendant co-partnership for causing the death of the minor, inspected the minutes of the coroner's inquest and performed other and further legal services in the prosecution of said claim.

"7. That on July 9, 1941, the plaintiff conferred with the insurer of the defendant co-partnership and was then and there informed that the claim had been settled with the administrator of the estate of the said minor, deceased, for the sum of Five Hundred and no/100 dollars.

"8. That under and by virtue of the Notice of Attorney's Lien, heretofore set forth, and of which the defendant co-partnership long prior to the settlement had full notice, the plaintiff is entitled to have of and from the said defendant co-partnership the sum of One Hundred Sixty-Six and 66/100 Dollars; for which amount plaintiff prays for judgment."

"Exhibit 'A'

"Chicago, Ill. 5/3/41

"I hereby retain and employ Burton R. Abrams attorney to

prosecute and/or settle all suits and claims for damages against Berg's Grocery & Liquor Store for causing the wrongful death of my son LeRoy, arising out of an accident, which occurred at or near 3147 Rhodes Avenue (rear) on the 2nd day of May, 1941.

"And I agree to pay him as compensation for his services a sum of money equal to 25% of any amount realized from said claims by settlement or 33-1/3% by judgment.

"Evelyn Smith, mother of
LeRoy Smith and natural guardian

"It is further agreed that no settlement will be made without the consent of the claimant.

Burton R. Abrams"

Here follows, as "Exhibit 'B'", Notice of Attorney's Lien.

Defendant's motion to strike is as follows:

"Now comes the defendant * * * and moves the Court to Strike Plaintiff's Amended Statement of Claim, for the following reasons:

"1. The Attorney's Lien therein referred to, was addressed to 'Berg's Market and Liquor Store,' which is a co-partnership, and said Attorney's Lien was therefore ineffective, as it must be served on one of the 'co-partners', and was not so served.

"2. That the 'Contract' referred to, was to prosecute or settle a claim, against 'Berg's Market and Liquor Store', which is a co-partnership and said 'Contract' was therefore void as against either or any of the co-partners.

"3. That said 'Contract', and said 'Lien' purported to make a claim for damages, on behalf of 'Evelyn Smith, as Mother and natural Guardian of the deceased minor,' and not on behalf of Evelyn Smith as beneficiary of the Estate of said minor.

"4. That the settlement, as set forth in the Amended Statement of Claim, alleges that the settlement was made with the 'Administrator of the Estate of the minor,' and was made under an Order of the Probate Court of Cook County, Illinois, and,

prosecute and/or settle all suits and claims for damages against Berg's Grocery & Liquor Store for causing the wrongful death of my son LeRoy, arising out of an accident, which occurred at or near 2147 Rhodes Avenue (rear) on the 2nd day of May, 1941.

"And I agree to pay him as compensation for his services a sum of money equal to 33⅓ of any amount realized from said claims by settlement or 33-1/3% by judgment.

"Evelyn Smith, mother of
LeRoy Smith and natural guardian

"It is further agreed that no settlement will be made without the consent of the claimant.

Burton R. Abrams"

Here follows, as "Exhibit 'B'", Notice of Attorney's Lien.

Defendant's motion to strike is as follows:

"Now comes the defendant * * * and moves the Court to Strike Plaintiff's Amended Statement of Claim, for the following reasons:

"1. The Attorney's Lien therein referred to, was addressed to 'Berg's Market and Liquor Store,' which is a co-partnership, and said Attorney's Lien was therefore ineffective, as it must be served on one of the 'co-partners,' and was not so served.

"2. That the 'Contract' referred to, was to prosecute or settle a claim, against 'Berg's Market and Liquor Store,' which is a co-partnership and said 'Contract' was therefore void as against either or any of the co-partners.

"3. That said 'Contract,' and said 'Lien' purported to make a claim for damages, on behalf of 'Evelyn Smith, as Mother and natural Guardian of the deceased minor,' and not on behalf of Evelyn Smith as beneficiary of the Estate of said minor.

"4. That the settlement, as set forth in the Amended Statement of Claim, alleges that the settlement was made with the 'Administrator of the Estate of the minor,' and was made under an Order of the Probate Court of Cook County, Illinois, and,

therefore, any claim for Attorney's fees must be made against said 'Administrator'.

"5. That the cause of Action originally was an Action for damages for wrongful death, and said matter of Action for wrongful death can only be prosecuted by an Administrator or Legally-appointed 'Next of Kin' of the deceased, and the Mother was not competent to contract for the services of an Attorney on behalf of the Administrator of the Estate of said Deceased.

"6. That the Order of the Probate Court, approving the settlement, provided for the amount of Attorney's fee to be paid, and in addition thereto it shows that the Mother was not the sole beneficiary, or heir-at-law of said minor, but, on the contrary, that said minor had a Sister, by the name of 'Selma Smith', as is set-forth in said Order of the Probate Court, the Records of which Probate Court this Municipal Court must take Judicial notice of.

"7. That the Amended Statement of Claim states that said 'Contract' was by and between the plaintiff herein and the Mother of the deceased.

"8. That the Attorney's Lien alleged to have been served, is therefore not in accord with the contract-of-employment, which is the basis of an Attorney's Lien.

"9. That there is no 'Contract' in existence between the plaintiff, Burton R. Abrams, and the defendant herein, Berg's Market and Liquor Store, and therefore this Cause-of-action cannot be based on a 'contract,' but should be based, if at all, on, or be a suit on, an Attorney's Lien.

"Wherefore, the defendant Moves the Court for judgment on the pleadings, or in the alternative, to strike the Amended Statement of claim and dismiss the defendant."

Upon the hearing of the motion to strike defendant was allowed to file a certified copy of certain proceedings in the

therefore, any claim for attorney's services may be made against said 'Administrator'.

"5. That the cause of action specifically sue on action for damages for wrongful death, and said matter of action for wrongful death can only be prosecuted by an administrator or specially appointed 'next of kin' of the deceased, and the father was not competent to contract for the services of an Attorney on behalf of the Administrator of the Estate of said deceased.

"6. That the order of the Probate Court, approving the settlement, provided for the amount of Attorney's fee to be paid, and in addition thereto it shows that the mother was not the sole beneficiary, or heir-at-law of said minor, but, on the contrary, that said minor had a father, by the name of 'John Smith', as set-forth in said order of the Probate Court, the Record of which Probate Court this Municipal Court must take Judicial notice of.

"7. That the Amended Statement of Claim states that said 'Contract' was by and between the plaintiff herein and the father of the deceased.

"8. That the Attorney's Lien alleged to have been served, is therefore not in accord with the contract-of-employment, which is the basis of an Attorney's Lien.

"9. That there is no 'Contract' in existence between the plaintiff, Burton E. Bloom, and the defendant herein, Pure's Market and Liquor Store, and therefore this Suit-of-action cannot be based on a 'contract', nor should be based, if at all, on, or be a suit on, an Attorney's Lien.

"Wherefore, the defendant moves the Court for judgment on the pleadings, or in the alternative, to strike the Amended Statement of claim and dismiss the defendant."

Upon the hearing of the motion to strike defendant was allowed to file a certified copy of certain proceedings in the

Probate court in the matter of the Estate of LeRoy Smith, and defendant's counsel referred to the said copy in his argument in support of the motion to strike. From this certified copy it appears that The Trust Company of Chicago was appointed by the Probate court Administrator of the Estate of LeRoy Smith; that the sole asset of the estate consisted of the cause of action against defendant; that the only heirs at law were Evelyn Singleton, mother, and Selma Smith, four years of age, a sister; that the defendant had offered in compromise and settlement of any right of action against it the sum of $500; and that the court ordered that the cause of action be compromised for $500. The certified copy also contains the following:

"It is further ordered that said administrator pay out and expend the proceeds of said settlement in the manner following:

"To Clerk of the Probate Court Initial fee of $10.00 paid by John H. Kay for court costs

"To The Trust Company of Chicago, Admr's fee		$ 15.00
"To Daniel W. Ross for proof of heirship		3.00
"To John H. Kay attorney for professional services rendered to said estate and for such further services as shall be required until said estate is closed, a sum equal to 25% of said settlement (See Note A below) and reimburse him for:	$125.00	
"Fee paid to Clerk of Probate Court	10.00	
" " " for certified copy of order	1.00	136.00
"To Evelyn Singleton, mother - her distributive share amounting to $115.34, and in addition thereto $30.66 from the distributive share of Selma Smith, minor for her support and maintenance		146.00

"To Selma Smith, minor sister of decedent, balance of her distributive share, deposited in First

Probate court in the matter of the Estate of Lenoy Smith, and defendant's counsel referred to the said copy in his argument in support of the motion to strike. From this certified copy it appears that The First Company of Chicago was appointed by the Probate court Administrator of the Estate of Lenoy Smith; that the sole asset of the estate consisted of the cause of action against defendant; that the only heirs at law were Evelyn Singleton, mother, and Selma Smith, four years of age, a sister; that the defendant had offered in compromise and settlement of any right of action against it the sum of $500; and that the court ordered that the cause of action be compromised for $500. The certified copy also contains the following:

"It is further ordered that said administrator pay out and expend the proceeds of said settlement in the manner following:

"To Clerk of the Probate Court Initial fee of $10.00 paid by John H. Ray for court costs

"To The First Company of Chicago, Admr's fee $ 15.00

"To Daniel E. Ross for proof of heirship 3.00

"To John H. Ray attorney for professional services rendered the said estate and for such further services as shall be required until said estate is closed, a sum equal to 25% of said settlement $125.00

(See Note A below) and reimburse him for:

"Fee paid to Clerk of Probate Court 10.00

" " " for certified copy of order 1.00 136.00

"To Evelyn Singleton, mother - her distributive share amounting to $115.34, and in addition thereto $30.66 from the distributive share of Selma Smith, minor for her support and maintenance 146.00

"To Selma Smith, minor sister of deceased, balance of her distributive share, deposited in First

National Bank of Chicago, subject to further order of this Court or until said minor attains her majority $200.00

"Total Disbursements $500.00"

Upon the motion to strike the parties filed written arguments, which are incorporated in the record. The material part of the written argument of defendant's counsel is as follows:

"In the instant case, the mother, Evelyn Smith, was never appointed Administratrix, but the Trust Company of Chicago was appointed Administrator, hired its own Attorney and settled the case, under an Order of the Probate Court of Cook county, Ill.; said Attorney of the Administrator was paid his fee, out of the funds of the Estate, by Order of the Probate Court, and the funds of the Estate were distributed to the beneficiaries, and the Administrator (Trust Company of Chicago) never ratified the contract that is alleged by the plaintiff in the instant case to have been made between himself and Evelyn Smith, the mother.

"We respectfully submit that under the Decision of the Appellate Court in the case of Tuohy v. Chicago & Joliet Electric Railway Co., [200 Ill. App. 446] which we have quoted above, plaintiff's Statement of Claim, in the instant case, should be stricken, and that judgment should be entered for and on behalf of the defendant, for the reason that plaintiff has no right-of-action against defendant."

The motion to strike was in effect a demurrer to the statement of claim and all of the facts well pleaded in the statement were admitted by the motion. It is hardly necessary to state that the allegations in the motion to strike as to alleged proceedings in the Probate court and the certified copy of proceedings in that court could not properly be considered upon the motion to strike, but it is clear that they were considered by the trial court in determining that motion. Even if it could be held that the alleged proceedings in the Probate court set up a

National Bank of Chicago, subject to further order of this Court or until said minor attains her majority

"Total disbursements $[illegible]"

Upon the motion to strike the partial trial written arguments, which are incorporated in the record. The material part of the written argument of defendant's counsel is as follows:

"In the instant case, the mother, Evelyn Smith, was never appointed Administratrix, but the First Company of Chicago was appointed Administrator, hired its own attorney and settled the case, under an Order of the Probate Court of Cook County, Ill.; said Attorney of the Administrator was paid his fee, out of the funds of the Estate, by Order of the Probate Court, and the funds of the Estate were distributed to the beneficiaries, and the Administrator (First Company of Chicago) never ratified the contract that is alleged by the plaintiff in the instant case to have been made between himself and Evelyn Smith, the mother.

"We respectfully submit that under the decision of the Appellate Court in the case of Duchy v. Chicago & Joliet Electric Railway Co., [200 Ill. App. 466] which we have quoted above, plaintiff's Statement of Claim, in the instant case, should be stricken, and that judgment should be entered for and on behalf of the defendant, for the reason that plaintiff has no right-of-action against defendant."

The motion to strike was in effect a demurrer to the statement of claim and all of the facts well pleaded in the statement were admitted by the motion. It is hardly necessary to state that the allegations in the motion to strike as to alleged proceedings in the Probate court and the certified copy of proceedings in that court could not properly be considered upon the motion to strike, but it is clear that they were considered by the trial court in determining that motion. Even if it would be held that the alleged proceedings in the Probate court set up a

good defense to plaintiff's claim, as defendant contends, the proper way to make such defense would be by answer.

In support of its contention that "the contract with the mother could not be the basis of an attorney's lien against the defendant * * *, that the only contract that could be made the basis of an attorney's lien in a death case must be between the attorney and the administrator of the estate to prosecute an action for wrongful death," defendant cites only the case, Tuohy v. Chicago & Joliet Electric Ry. Co., 200 Ill. App. 446, which case, defendant argues, is directly in point and sustains its contention. In the Tuohy case it appears that one Miner, individually, and not as administrator of the estate in question, entered into a contract with Tuohy to represent him in probating the estate of the deceased and also to represent him in an action for personal injuries that resulted in the death of the minor; that after the making of the contract Miner was appointed administrator of the estate of the minor and as administrator he compromised the claim. The opinion states that it does not appear that Miner had any interest in the claim which was compromised and settled, and that he never recognized, ratified or adopted the contract after he was appointed administrator. The Appellate court of the Second District held that under the facts the claim of Tuohy was against Miner individually. In the instant case plaintiff's statement of claim alleges that Evelyn Smith, also known as Evelyn Singleton, was the sole beneficiary and heir at law of the deceased minor, said minor having been born out of wedlock. The Tuohy case is not in point.

Plaintiff contends (a) that the contract with Mrs. Smith is valid and binding; (b) that "under the Injuries Act of the State of Illinois, a suit for wrongful death must be brought in the name of the personal representative of the decedent, but this action is for the exclusive benefit of the beneficiaries named in the statutes. The right and authority of the administrator who is only the

good defense to plaintiff's claim, as defendant contends, the proper way to make such defense would be by answer.

In support of its contention that this contract with the mother could not be the basis of an attorney's lien against the defendant * * *, that the only contract that could be made the basis of an attorney's lien in a death case must be between the attorney and the administrator of the estate to prosecute an action for wrongful death," defendant cites only one case, Tuohy v. Chicago & Joliet Electric Ry. Co., 187 Ill. App. 446, which case, defendant argues, is directly in point and sustains its contention. In the Tuohy case it appears that one Tuohy, individually, and not as administrator of the estate in question, entered into a contract with Tuohy to represent him in probating the estate of the deceased and also to represent him in an action for personal injuries that resulted in the death of the minor: but after the making of the contract Tuohy was appointed administrator of the estate of the minor and as administrator he compromised the claim. The opinion states that it does not appear that Tuohy had any interest in the claim which was compromised and settled, and that he never repudiated, ratified or adopted the contract after he was appointed administrator. The Appellate court of the Second District held that under the facts the claim of Tuohy was against Tuohy individually. In the instant case plaintiff's statement of claim alleges that Evelyn Smith, also known as Evelyn Simpkins, was the sole beneficiary and next of kin of the deceased minor, said minor leaving been born out of wedlock. The Tuohy case is not in point.

Plaintiff contends (a) that the contract with Mrs. Smith is valid and binding; (b) that under the Injuries Act of the State of Illinois, a suit for wrongful death must be brought in the name of the personal representative of the decedent, but this action is for the exclusive benefit of the beneficiaries named in the statutes. The right and authority of the administrator who is only the

representative of the beneficiaries to compromise or settle such a right of action is by no means exclusive, as the beneficiary may do what the trustee may do;" and (c) that Evelyn Smith, the sole beneficiary, had a "claim, demand or cause of action" against defendant, as set forth in plaintiff's lien notice, and that as the sole beneficiary she could contract for services of an attorney, as the beneficiary may do what the trustee could do.

In Mattoon Gas Light & Coke Co. v. Dolan, 105 Ill. App. 1, 4, the court said: "The right and authority of the administrator, who is only the representative of the beneficiary, to control the suit or settle it, is by no means exclusive. The principal may also do what the agent may. The beneficiary, if under no disability or limitation, may do what the trustee could do." And the court further held (pp. 3, 4): "The right of a sole beneficiary of a suit, who is under no disability, to settle and accept payment of the unliquidated damages due her, it seems to us is too plain and simple to need argument or authority in its support."

In Voorhees v. Chicago & Alton R. Co., 208 Ill. App. 86, the court said (pp. 93, 94): "Marcus Ryan, being the sole beneficiary and under no disability, had the right to settle and to accept and receipt to defendant for any damages, if he was entitled to recover damages for the death of his wife and children, if the same had been caused by the negligence of defendant. Voorhees, as administrator in the several estates, was but the legal agent of the beneficiary, Marcus Ryan. (Mattoon Gas Light & Coke Co. v. Dolan, 105 Ill. App. 1.) It is not always necessary that the parties to a suit should be nominally the same in order that one recovery may bar another."

In Ryan v. Chicago, M., St. P. & P. R. Co., 259 Ill. App. 472, the First Division of this court held that a contract between a widow, the sole surviving beneficiary of her husband, individually and as administratrix of his estate, and an attorney,

representative of the beneficiary, or conversely, as with such a right of action is by no means exclusive, as the beneficiary may do what the trustee may do;" and (c) that evidence, the sole beneficiary, had a "claim, demand or cause of action against defendant, as set forth in plaintiff's lien notice, and that is the sole beneficiary she could convey for purposes of an attorney, as the beneficiary may do what the trustee could do.

In Mattoon Gas Light & Coke Co. v. Dolan, 109 Ill. App. 1, 4, the court said: "The right and authority of the administrator, who is only the representative of the beneficiary, to control the suit or settle it, is by no means exclusive. The principal may also do what the agent may. The beneficiary, if under no disability or limitation, may do what the trustee could do." and the court further held (pp. 1, 4): "The right of a sole beneficiary of a suit, who is under no disability, to settle and accept payment of the liquidated damages due her, it seems to us is plain and simple to need argument or authority in its support."

In Voorhees v. Chicago & Alton R. Co., 208 Ill. App. 5, the court said (pp. 2, 9): "Marcus Ryan, being the sole beneficiary and under no disability, had the right to settle and to accept and receipt to defendant for any damages, if he was entitled to recover damages for the death of his wife and children, if the same had been caused by the negligence of defendant. Voorhees, as administrator in the several estates, was but the legal agent of the beneficiary, Marcus Ryan. (Mattoon Gas Light & Coke Co. v. Dolan, 109 Ill. App. 1.) It is not always necessary that the parties to a suit should be mentally the same in order that one recovery may bar another."

In Ryan v. Chicago, M., St. P. & P. R. Co., 259 Ill. 472, the first division of this court held that a contract between a widow, the sole surviving beneficiary of her husband, individually and as administratrix of his estate, and an attorney,

employing him to prosecute a suit or claim for the wrongful death of her husband, is valid, and may serve, upon her settlement of the claim direct with the wrongdoer, as the basis of an attorney's lien, although the settlement was made without authority from the Probate court. The opinion in that case states (pp. 477, 478, 479):

"In the Washington case [Washington v. Louisville & N. Ry. Co.] (136 Ill. 49), suit was brought by the administratrix to recover damages for the benefit of the widow and next of kin for wrongfully causing the death of her intestate. Judgment was entered in her favor for $200 in accordance with an agreement filed properly entitled in the cause and signed by plaintiff as administratrix and by herself in her individual capacity. It was contended on behalf of the administratrix that she had no power to make a binding agreement for the settlement of the case; that before she could be authorized to make such a settlement she must secure an order from the probate court. In passing on this question the court said (p. 56): 'We are of opinion that the statute referred to can have no application in cases of this sort. The recovery, here, was for the benefit, exclusively, of the widow and next of kin of the deceased person. The section of the statute referred to, requires the administrator to secure an order of the probate court authorizing him to settle or compound claims due the estate; and it is manifest, we think, that the claim here sought to be recovered was not a claim due the estate, within the meaning of this section. It is impossible that the estate should have derived any benefit whatever by a recovery in this case. True it is that the administrator would be required to account to the widow and heir, but in no legal or proper sense to the estate of the decedent.

"'This precise question was before this court in the case of Henchey, admx. v. City of Chicago, 41 Ill. 136, a [illegible] struc-

employing him to prosecute a suit or claim for the wrongful death of her husband, is valid, and may serve, upon her settlement of the claim direct with the wrongdoer, as the basis of an attorney's lien, although the settlement was made without authority from the probate court. The opinion in that case states (p. 477, 478, 479):

"In the Washington case [Washington v. Louisville & N. R. R. Co.] (136 Ill. 49), suit was brought by the administratrix to recover damages for the benefit of the widow and next of kin for wrongfully causing the death of her intestate. Judgment was entered in her favor for $2000 in accordance with an agreement filed properly entitled in the cause and signed by plaintiff as administratrix and by herself in her individual capacity. It was contended on behalf of the administratrix that she had no power to make a binding agreement for the settlement of the cause that before she could be authorized to make such a settlement she must secure an order from the probate court. In passing on this question the court said (p. 56): 'We are of opinion that the statute referred to can have no application in cases of this nature. The recovery, here, was for the benefit, exclusively, of the widow and next of kin of the deceased person. The section of the statute referred to, requires the administrator to secure an order of the probate court authorizing him to settle or compound claims due the estate; and it is manifest, we think, that the claim here sought to be recovered was not a claim due the estate, within the meaning of this section. It is impossible that the estate should have derived any benefit whatever by a recovery in this case. Here it is that the administrator would be required to act for the widow and heir, but in no legal or proper sense to act for the estate of the deceased.

continued

"This precise question was before this court, ... in case of Hanchett, Adm., v. City of Chicago, 41 Ill. 136, a attorney, ...

tion there given to the statute, authorizing recoveries in cases of this sort, has for very nearly a quarter of a century been accepted as the law. In that case a stipulation was filed in the absence of the plaintiff or her attorney, and the judgment of the court rendered thereon. It was sought, subsequently, to set aside that judgment upon the same grounds here insisted upon. In that case, after disposing of the other grounds upon which it was alleged the judgment should have been set aside, we said: "Neither can we agree with appellant's counsel in the position that the plaintiff had no power to make the stipulation by which the suit was dismissed. The statute vested in her, as administratrix, the right of action, and the legal title to whatever damages were recoverable. This, of necessity, gave her the legal right to control the prosecution and disposition of the suit. Whether the children, who, with herself, were interested in the distribution of whatever damages might have been recovered, can call her to account for any error of judgment she may have committed in making the settlement, is to be decided when they make the attempt."' And the court held that the agreement made by the administratrix was binding.

"In the Dolan case (105 Ill. App. 1), it was held that the administratrix, who was the sole beneficiary of the suit, had authority to settle a claim for damages on account of the death of the administratrix' intestate. In that case the administratrix recovered a judgment of $1,000 for the wrongful death of her intestate, and on appeal this court said (p. 3): 'Appellant (defendant) offered in evidence an instrument of writing, proved to have been executed by the widow, by which she acknowledged the receipt of $200, paid her by the appellant, in consideration of which she thereby released appellant from the cause of action incident upon her husband's death.' The court held this agreement was binding and reversed the judgment.

"In the instant case the administratrix, Mrs. Dow, is the sole surviving beneficiary of the deceased and under the law as announced

tion there given to the statute, authorizing recoveries in cases of this sort, has for very nearly a quarter of a century been accepted as the law. In that case a stipulation was filed in the absence of the plaintiff or her attorney, and the judgment of the court rendered thereon. It was sought, consequently, to set aside that judgment upon the same grounds here insisted upon. In that case, after disposing of the other grounds upon which it was alleged the judgment should have been set aside, we said: 'Neither can we agree with appellant's counsel in the position that the plaintiff had no power to make the stipulation by which the suit was dismissed. The statute vested in her, as administratrix, the right of action, and the legal title to whatever damages were recoverable. This, of necessity, gave her the legal right to control the prosecution and disposition of the suit. Whether the children, who, with herself, were interested in the distribution of whatever damages might have been recovered, can call her to account for any error of judgment she may have committed in making the settlement, is to be decided when they make the attempt.'" and the court held that the agreement made by the administratrix was binding.

"In the Dolan case (107 Ill. App. 1), it was held that the administratrix, who was the sole beneficiary of the suit, had authority to settle a claim for damages on account of the death of the administratrix' intestate. In that case the administratrix recovered a judgment of $1,000 for the wrongful death of her intestate, and on appeal this court said (p. 3): 'Appellant (defendant) offered in evidence an instrument of writing, proved to have been executed by the widow, by which she acknowledged the receipt of $800, paid her by the appellant, in consideration of which she thereby released appellant from the cause of action incident upon her husband's death.' The court held this agreement was binding and reversed the judgment.

"In the instant case the administratrix, Mrs. Dow, is the sole surviving beneficiary of the deceased and under the law as announced

in the Washington and Dolan cases, supra, we hold that the contract entered into between Mrs. Dow individually, and as administratrix, with Ryan, was binding and valid."

As Evelyn Smith had the right to settle the claim against defendant, and as such settlement, had she made one, would have been a bar to any suit brought by the administrator of the estate, there would seem to be no good reason why she could not hire an attorney to represent her in the matter of the claim against defendant. Plaintiff's amended claim alleges that Evelyn Smith, also known as Evelyn Singleton, was the sole beneficiary and heir at law of the deceased minor, and we hold that she had the legal right to make the contract in question with plaintiff, that such contract is valid and binding, and may be made the basis of an attorney's lien.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to overrule the motion to strike and for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

in the Washington and Union cases, supra, we held that the contract entered into between Mrs. Dow individually, and as administratrix, with Ryan, was binding and valid."

As Evelyn Smith had the right to settle the claim against defendant, and as such settlement, had she so, would have been a bar to any suit brought by the administrator of the estate, there would seem to be no good reason why she could not hire an attorney to represent her in the matter of the claim against defendant. Plaintiff's amended claim alleges that Evelyn Smith, also known as Evelyn Hinchelson, was the sole beneficiary and heir at law of the deceased minor, and we hold that she had the legal right to make the contract in question with plaintiff, that such contract is valid and binding, and may be made the basis of an attorney's lien.

The judgment of the municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to overrule the motion to strike and for further proceedings not inconsistent with this opinion.

MCSURELY, P. J., and FRIEND, J., concur.

Sullivan, P. J., and Friend, J., concur.

42236

ESTATE OF WILLIAM BENSON STOREY, Deceased, Appellee,	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
v.	)	
199 LAKE SHORE DRIVE, INC., a corporation, Appellant.	)	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case should have been filed in this court under the title, "199 Lake Shore Drive, Inc., Appellant, v. Continental Illinois National Bank and Trust Company of Chicago and Nelson W. Willard, Executors of the Last Will and Testament of William Benson Storey, Deceased, Appellees.

Appellant filed an amended claim in the Probate court of Cook county against the estate of William Benson Storey for rent, interest and attorney's fees and costs, based upon a written lease between appellant and Storey for certain premises. The total amount of the claim was $2,371.90 and costs. Upon a hearing in the Probate court the claim was allowed in the said sum and the executors of the estate appealed to the Circuit court of Cook county. There the cause was heard de novo before the court without a jury and a judgment order was entered allowing the claim against the estate in the sum of $1,198 as a seventh class claim and the costs of the estate in the sum of $19.50 were assessed against the claimant (appellant). The claimant appeals from that order.

The lease was executed on April 26, 1940, by the claimant, as lessor, and William B. Storey, as lessee, and involved a ten or twelve room apartment in the building known as 199 Lake Shore Drive, Chicago. It was prepared and drafted by the claimant. The term commenced May 1, 1940, and expired April 30, 1941. The rental was $350 per month, payable each month in advance. The lease had the usual provisions that are contained in such

STATE OF WILLIAM BENSON STOREY, Deceased, Appellee,	FIRST TRUST DISTRICT COURT OF COOK COUNTY.
v.	
1929 LAKE SHORE DRIVE, INC., a corporation, Appellant.	

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case should have been filed in this court under the title, "1929 Lake Shore Drive, Inc., Appellant, v. Continental Illinois National Bank and Trust Company of Chicago and Nelson H. Willard, Executors of the Last Will and Testament of William Benson Storey, Deceased, Appellees.

Appellant filed an amended claim in the Probate court of Cook county against the estate of William Benson Storey for rent, interest and attorney's fees and costs, based upon a written lease between appellant and Storey for certain premises. The total amount of the claim was $2,371.90 and costs. Upon a hearing in the Probate court the claim was allowed in the said sum and the executors of the estate appealed to the Circuit court of Cook county. There the cause was heard de novo before the court without a jury and a judgment order was entered allowing the claim against the estate in the sum of $1,198 as a seventh class claim and the costs of the estate in the sum of $19.50 were assessed against the claimant (appellant). The claimant appeals from that order.

The lease was executed on April 20, 1940, by the claimant, as lessor, and William B. Storey, as lessee, and involved a two or twelve room apartment in the building known as 1929 Lake Shore Drive, Chicago. It was prepared and drafted by the claimant. The term commenced May 1, 1940, and expired April 30, 1941. The rental was $350 per month, payable each month in advance. The lease had the usual provisions that are contained in such

type of lease. There was a rider, marked "Exhibit 'A'", attached to the lease and signed by the parties, which reads as follows:

"In the event of the death of the Lessee or Mrs. Storey, it is agreed that either the Lessee or Mrs. Storey, may cancel this lease by giving the Lessor thirty (30) days' notice in writing and by reimbursing the Lessor the entire cost of the decorating done in the apartment covered by said lease in the event cancellation takes place within the first six months of lease. If cancellation takes place after six months the cost of decorating will be prorated over the unexpired time."

Clause Twentieth of the lease provides: "All covenants, promises, representations and agreements herein contained shall be binding upon, apply and inure to the benefit of the heirs, executors, administrators or assigns respectively of the Lessor and Lessee."

Storey and his wife left Chicago for California and while they were in that State Mrs. Storey died, on September 3, 1940. On September 5 John T. Wheeler & Company, real estate agents for claimant, received a telegram from Mr. Storey, which reads as follows: "Please postpone for the present decoration of my apartment. I may decide to cancel lease account death of Mrs. Storey. Will decide later." Mr. Storey returned to Chicago about September 12, 1940. He held conferences with his attorneys and was busy looking after his wife's affairs. The apartment was so torn up that it was not in a livable condition, and an employee of the agent of claimant testified that Storey instructed her to proceed with the decorating of the apartment. This work was done at a cost of $148. On September 19, 1940, Mr. Storey appeared in the Probate court to prove the heirship in his wife's estate and on the evening of that day he went to St. Luke's hospital, in Chicago, where he remained until two days before his death, which occurred on October 24, 1940. He was eighty-three years of age.

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"In the event of the death of the lessee or Mrs. Storey, it is agreed that either the lessee or Mrs. Storey may cancel this lease by giving the lessor thirty (30) days' notice in writing and by reimbursing the lessor the unpaid cost of the decorating done in the apartment covered by said lease in the event cancellation takes place within the first six months of lease. If cancellation takes place after six months the cost of decorating will be prorated over the unexpired time."

Clause twentieth of the lease provides: "All covenants, promises, representations and agreements herein contained shall be binding upon, apply and inure to the benefit of the heirs, executors, administrators or assigns respectively of the lessor and lessee."

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His will was filed for probate in the Probate court of Cook county and on December 11, 1940, letters testamentary issued to Continental Illinois National Bank and Trust Company of Chicago and Nelson W. Willard, as executors of the estate. On December 31, 1940, the executors served the following written notice on the claimant through its agent:

"December 31, 1940.

"199 Lake Shore Drive, Inc.
"John T. Wheeler & Company, Agents
"First National Bank Building
"Chicago, Illinois.

"Gentlemen:

"Reference is made to a certain apartment lease dated April 26, 1940 entered into between 199 Lake Shore Drive, Inc., by John T. Wheeler & Co., Agents, Lessors, and William B. Storey, Lessee.

"As you know, William B. Storey, the Lessee, died on October 24, 1940 and the undersigned were appointed Executors of his estate by the Probate Court of Cook County on December 11, 1940.

"In accordance with the provisions of said lease and particularly Exhibit 'A' attached thereto and paragraph Twentieth thereof, you are notified in accordance with the 30-days notice requirement that the undersigned now elects to and does hereby cancel and terminate said lease, such cancellation and termination to be effective as of January 31, 1941.

"There is enclosed herewith check of the Continental Illinois National Bank and Trust Company in the sum of $1,198.00 covering the rental in full to the date of cancellation for the months of November and December, 1940 and January, 1941, plus the sum of $148.00 which we understand from your Pearl Neumer was the cost of the decorating done in the apartment.

His will was filed for probate in the Probate court of Cook county and on December 11, 1940, letters testamentary issued to Continental Illinois National Bank and Trust Company of Chicago and Nelson W. Willard, as executors of the estate.

On December 31, 1940, the executors served the following written notice on the claimant through its agent:

"December 31, 1940.

"199 Lake Shore Drive, Inc.

"John T. Wheeler & Company, Agents

"First National Bank Building

"Chicago, Illinois.

"Gentlemen:

"Reference is made to a certain apartment lease dated April 26, 1940 entered into between 199 Lake Shore Drive, Inc., by John T. Wheeler & Co., Agents, lessors, and William B. Storey, lessee.

"As you know, William B. Storey, the lessee, died on October 24, 1940 and the undersigned were appointed executors of his estate by the Probate Court of Cook County on December 11, 1940.

"In accordance with the provisions of said lease and particularly Exhibit 'A' attached thereto and paragraph twentieth thereof, you are notified in accordance with the 30-days notice requirement that the undersigned now elect to and does hereby cancel and terminate said lease, such cancellation and termination to be effective as of January 31, 1941.

"There is enclosed herewith check of the Continental Illinois National Bank and Trust Company in the sum of $1,198.00 covering the rental in full to the date of cancellation for the months of November and December, 1940 and January, 1941, plus the sum of $142.00 which we understand from your Paul Hunter was the cost of the decorating done in the apartment.

"Kindly acknowledge receipt of this notice by signing and returning the carbon copy which is also enclosed.

"CONTINENTAL ILLINOIS NATIONAL BANK AND
TRUST COMPANY OF CHICAGO

"By /s/ B. E. Bronston,
Assistant Secretary.

/s/ Nelson W. Willard

"Executors of the Last Will and Testament
of William Benson Storey, deceased."

The "check" inclosed reads as follows:

"199 Lake Shore Drive and John T. Wheeler
and Company, Agents

Date Dec. 31, 1940

Received Eleven Hundred Ninety Eight and
No/100 #### Dollars from Continental
Illinois National Bank and Trust Company
of Chicago

William Benson Storey Exec. 34051 $1198.00

In Settlement of Account as Follows
Payment in full to date of cancella-
tion of William Benson Storey Lease,
Dated 4-26-40 as Follows: Nov. and
Dec. 1940 and Jan. 1941 rent 1050.00
Cost of decorating apartment in
accordance with lease 148.00

Do Not Detach

Approved

Endorse check and
W- Sign Receipt Here.....
..... No. 58922

Do Not Detach

.....

"Kindly acknowledge receipt of this course by signing and returning the carbon copy which is also enclosed.

"CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

"By /s/ H. S. Thomston,

Assistant Secretary.

/s/ Nelson A. Allend

"Signature of the Last Will and Testament of William Benson Storey, Deceased."

The "check" inclosed reads as follows:

"1295 Lake Shore Drive and John T. Wheeler and Company, Agents

Date Dec. 23, 1940

Received Eleven Hundred Ninety Eight and 10/100 (1198) Dollars from Continental Illinois National Bank and Trust Company of Chicago

William Benson Storey Exec. Estate 1198.00

In settlement of account as follows Do Not Detach

Payment in full to date of cancellation of William Benson Storey Lease, Dated 4-25-40 as follows: Nov. and Dec. 1940 and Jan. 1941 rent 1050.00

Cost of decorating apartment in accordance with lease 148.00

Approved

Endorsed check and

Sign Receipt Here.....

.....No. 5292

Do Not Detach

.....

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY
OF CHICAGO

2-3 2-3

Chicago December 31, 1940 No. 58922

When the Above Receipt is Properly Signed and
with such Receipt Attached Hereto
Pay to the
Order of 199 Lake Shore Drive Inc. John T.
Wheeler and Company, Agents $1198.00
Eleven Hundred Ninety Eight & No/100 ####
Dollars

Trust Department J. P. Alinsdal
Teller
J. Kepler
Authorized Officer"

On the reverse side, across the middle, of the upper half of this instrument appears the following: "Do Not Write or Stamp Here". On the reverse side, across the top, of the lower half of this instrument appears the following:

"Sign Receipt Attached and Endorse Here

_____

_____"

This "check" was retained by the claimant until April 26, 1941.

Claimant's attorneys addressed to the attorneys for the estate a letter, dated January 3, 1941, which reads as follows:

"You will please be advised that your communication of December 31, 1940, together with your check in the sum of $1,198 has been referred to us for our attention.

"After an examination of the lease in question, the basis of the claim of our client for rent for the period of November, 1940

CONTINENTAL INTERIOR MORTGAGE AND
AGENCY COMPANY
OF CHICAGO

E-3 -3

Chicago December 15, 1940 No. 9521

When the above Receipt is properly signed and
with such Receipt attached Return
Pay to the
Order of Joe Lake Short Drive Inc. John L.
Wheeler and Company, Agents $1197.00
Eleven Hundred Ninety Seven & 00/100 ----
Dollars

Trust Department G. P. Altmeier

Teller

L. Kepler

Endorsement Effect

On the reverse side, across the middle, of the upper half of this instrument appears the following: "Do Not Write or Stamp Here". On the reverse side, across the top, of the lower half of this instrument appears the following:

"Sign Receipt attached and Endorse Here

_____

"_____

This "check" was retained by the claimant until April 26, 1941. Claimant's attorneys addressed to the attorneys for the estate a letter, dated January 3, 1941, which reads as follows:

"You will please be advised that your communication of December 31, 1940, together with your check in the sum of $1,197 has been referred to us for our attention.

"After an examination of the lease in question, the basis of the claim of our client for rent for the period of November, 1940

to and including April 30, 1941 at $350 a month, it is our opinion that the above mentioned estate is liable for the full amount.

"If it is your desire to amicably adjust this matter before we file our claim against the estate, we would appreciate your so advising us."

Following the receipt of this letter there was an exchange of correspondence between claimant's attorneys and the attorneys for the estate, the former asserting claimant's right to the rent for the balance of the term of the lease, while the latter insisted that the estate was only liable for rent to January 31, 1941, plus the sum of $148, the cost of decorating the apartment. On April 26, 1941, the attorneys for claimant wrote a letter to the attorneys for the estate which contained, inter alia, the following: "You will also find enclosed your check, dated December 31, 1940, bearing No. 58922 in the sum of $1198.00, which through error was not returned to you in our letter of January 3, 1941." In answer to the foregoing, the attorneys for the estate wrote a letter, on April 28, 1941, which contained, inter alia, the following:

"We acknowledge your letter of April 26 together with enclosures therein referred to, including the check of the Continental Illinois National Bank and Trust Company No. 58922 dated December 31, 1940 payable to the order of 199 Lake Shore Drive, Inc. John T. Wheeler in the sum of $1,198.00.

"We cannot accept the return of the check at this late date and the said check is enclosed herewith. You have had the check in your possession for approximately four months.

"Moreover, on reading your letter of January 3, 1941 addressed to the Executors of this estate we fail to find anything therein which would indicate that you intended to return the check. On the contrary, your letter indicates quite clearly that this matter

to and including April 30, 1941 at $150 a month, it is our opinion that the above mentioned estate is liable for the full amount.

"If it is your desire to amicably adjust this matter before we file our claim against the estate, we would appreciate your so advising us."

Following the receipt of this letter there was an exchange of correspondence between claimant's attorneys and the attorneys for the estate, the former asserting claimant's right to the rent for the balance of the term of the lease, while the latter insisted that the estate was only liable for rent to January 31, 1941, plus the sum of $148, the cost of securing the apartment. On April 26, 1941, the attorneys for claimant wrote a letter to the attorneys for the estate which contained, inter alia, the following: "You will also find enclosed your check, dated December 31, 1940, bearing No. 78922 in the sum of $1198.00, which through error was not returned to you in our letter of January 3, 1941." In answer to the foregoing, the attorneys for the estate wrote a letter, on April 28, 1941, which contained, inter alia, the following:

"We acknowledge your letter of April 26 together with enclosures therein referred to, including the check of the Continental Illinois National Bank and Trust Company No. 78922 dated December 31, 1940 payable to the order of 129 Lake Shore Drive, Inc. John T. Wheeler in the sum of $1,198.00.

"We cannot accept the return of the check at this late date and the said check is enclosed herewith. You have had the check in your possession for approximately four months.

"Moreover, on reading your letter of January 3, 1941 addressed to the Executors of this estate we fail to find anything therein which would indicate that you intended to return the check. On the contrary, your letter indicates quite clearly that this matter

had been referred to you for attention and that you did not intend to return the check."

On January 25, 1941, the key of the apartment was turned over to claimant's agent by the attorneys for the executors.

The following is claimant's theory of the case: "Claimant is entitled to a judgment for rent for the months of November, 1940 to April, 1941, both inclusive, together with attorney's fees, interest and costs pursuant to the terms of the lease; that the estate could not terminate the lease because (a) lessee had made his election after the death of his wife and he could not retrace his steps; (b) after his wife's death only lessee had the right to cancel the lease within a reasonable time after her death; (c) that assuming the executors had a right to cancel the lease within a reasonable time after lessee's death, they waived that right by not attempting to exercise it within a reasonable time thereafter, as the lessee died October 24, 1940 and the notice of cancellation was sent on December 31, 1940, the lease expiring by its terms April 30, 1941."

The estate states its theory of the case as follows: "1. Under the terms of the lease in question the trial court properly held that said lease had been legally terminated by the Estate on January 31, 1941. 2. The acceptance and retention by Claimant of the check tendered by the Estate for $1,198.00, the sum admitted by the Estate to be due to January 31, 1941, the date of cancellation of the lease, constituted an acceptance by the Claimant of the terms and conditions on which the check was delivered."

The claimant contends that as the lease did not state how soon after his wife's death Storey had to give the notice of cancellation this right had to be exercised within a reasonable time after her death and that the notice of cancellation served December 31, 1940, was not given within a reasonable time. The lease was

had been referred to you for attention and that you did not intend to return the check."

On January 27, 1941, the key of the apartment was turned over to claimant's agent by the attorneys for the executors.

The following is claimant's theory of the case: "Claimant is entitled to a judgment for rent for the months of November, 1940 to April, 1941, both inclusive, together with attorney's fees, interest and costs pursuant to the terms of the lease; that the estate could not terminate the lease because (a) lessee had made his election after the death of his wife and he could not retrace his steps; (b) after his wife's death only lessee had the right to cancel the lease within a reasonable time after her death; (c) that assuming the executors had a right to cancel the lease within a reasonable time after lessee's death, they waived that right by not attempting to exercise it within a reasonable time thereafter, as the lessee died October 24, 1940 and the notice of cancellation was sent on December 31, 1940, the lease expiring by its terms April 30, 1941."

The estate states its theory of the case as follows: "1. Under the terms of the lease in question the trial court properly held that said lease had been legally terminated by the Estate on January 31, 1941. 2. The acceptance and retention by Claimant of the check tendered by the Estate for $1,[illegible].00, the sum admitted by the Estate to be due to January 31, 1941, the date of cancellation of the lease, constituted an acceptance by the Claimant of the terms and conditions on which the check was delivered."

The claimant contends that as the lessee did not state how soon after his wife's death Storey had to give the notice of cancellation this right had to be exercised within a reasonable time after her death and that the notice of cancellation served December 31, 1940, was not given within a reasonable time. The lease was

prepared and drafted by the claimant and therefore should be most strongly construed against the claimant if there be any doubt or uncertainty as to the meaning of the rider. (See Jewell Filter Co. v. Kirk, 102 Ill. App. 246, 250; Goldberg v. Pearl, 306 Ill. 436, 439, 440; Wright v. Takito, 210 Ill. App. 58, 60.) If the claimant intended that the lessee should have a limited time within which to cancel the lease it should have plainly said so in the lease. Cases where a lessee, after the discovery of fraud, must cancel his lease within a reasonable time are cited by claimant, but they are not in point. The instant contention of claimant cannot be sustained. Even if it should be held that the rider required that the notice of cancellation had to be made within a reasonable time, nevertheless, we would hold that under the somewhat unusual facts of this case the notice to cancel was made within a reasonable time. In this connection it must be borne in mind that in the matter of the right of cancellation the executors, under clause Twentieth of the lease, stood in the shoes of Storey. It will be further noted that the rider contemplates that the lessee may exercise the right of cancellation after the work of the decorating of the apartment had been completed.

Claimant contends that Mr. Storey after returning to Chicago elected to remain in the apartment and thereby waived his right of cancellation. This contention is based upon an alleged conversation between Mr. Storey and Pearl Neumer, an employee of claimant, after Mr. Storey had returned to Chicago. It appears that prior to the time that the Storeys went to California Mrs. Storey had ordered the decorating of the apartment, and Pearl Neumer, when she was first called as a witness, was asked if she had had any conversation with Mr. Storey after his return to Chicago and she stated that she had. The witness was then allowed, over the objection of the estate, to testify that she had a conversation with Mr. Storey after his return to Chicago in which he stated to her

prepared and drafted by the claimant and therefore should be most strongly construed against the claimant if there is any doubt or uncertainty as to the meaning of the rider. (See Dowell Milling Co. v. Kirk, 102 Ill. App. 244, 247; Mulhern v. Ford, 98 Ill. 436, 439, 440; Wright v. Tarito, 12 Ill. App. 76, 80.) If the claimant intended that the lessee should have a limited time within which to cancel the lease it should have plainly said so in the lease. Cases where a lessee, after the discovery of fraud, must cancel his lease within a reasonable time are cited by claimant, but they are not in point. The instant contention of claimant cannot be sustained. Even if it should be held that the rider required that the notice of cancellation had to be made within reasonable time, nevertheless, we would hold that under the somewhat unusual facts of this case the notice to cancel was made within a reasonable time. In this connection it must be borne in mind that in the matter of the right of cancellation the provisions, under clause Twentieth of the lease, stood in the place of attorney. It will be further noted that the rider contemplates that the lessee may exercise the right of cancellation after the work of the decorating of the apartment had been completed.

Claimant contends that Mr. Storey after returning to Chicago elected to remain in the apartment and thereby waived his right of cancellation. This contention is based upon an alleged conversation between Mr. Storey and Pearl Weaver, an employee of claimant, after Mr. Storey had returned to Chicago. It appears that prior to the time that the Storeys went to California Mrs. Storey had ordered the decorating of the apartment, and Pearl Weaver, when she was first called as a witness, was asked if she had had any conversation with Mr. Storey after his return to Chicago and she stated that she had. The witness was then allowed, over the objection of the vendee, to testify that she had a conversation with Mr. Storey after his return to Chicago in which he stated to her

that he would like to have the decorating done as quickly as possible because the apartment was torn up and was not in a livable condition. After claimant's evidence was finished the same witness was called "in rebuttal," and, over the objection of the estate, she was allowed to testify to the following: That in the conversation she had with Mr. Storey, after his return to Chicago, he "also told me he intended to go back to California to live; that he had not made up his mind definitely, but that he wanted the apartment decorated so it was in a livable condition and that he planned to stay on until Spring at which time he would have his affairs in shape so that he could make up his mind." She was then pressed by counsel for claimant to state what further was said, and the following then occurred: "A. — and that he could not make up his mind exactly what he wanted to do; he felt he would like to go back to California, but that he at that time was not certain what he wanted to do, - he was not feeling any too well, - would I please get the apartment done as quickly as possible, as the apartment was not in a livable condition, and he said in the Spring he would know what he wanted to do. Mr. Davis [attorney for claimant]: Q. That is all that was said? A. That is all that was said. Mr. Davis: That is all. The Witness: (Continuing) That he intended to stay. Mr. Moody [attorney for the estate]: I object on the further ground it is not rebuttal." Upon this so-called rebuttal testimony of Pearl Neumer claimant bases its claim that Storey decided to remain in the apartment and to waive his right to cancel the lease. In <u>In re Estate of Hanson</u>, 304 Ill. App. 157, we had occasion to pass upon the evidence of admissions made by persons since dead. We there said (p. 162): "' * * * The Supreme Court of the United States, in <u>Lea v. Polk County Copper Co.</u>, 62 U.S. 493, observed that "courts of justice lend a very unwilling ear to statements of what dead men have said."'

that he would like to have the house turn over to claimant as possible because the apartment was kept up and was not in a livable condition. After claimant's evidence was finished the same witness was called "in rebuttal," and, over the objection of the estate, she was allowed to testify to the following: that in the conversation she had with Mr. Storey, after his return to Chicago, he "also told me he intended to go back to California to live; that he had not made up his mind definitely, but that he wanted the apartment decorated so it was in a livable condition and that he planned to stay on until spring at which time he would have his affairs in shape so that he could make up his mind." She was then pressed by counsel for claimant to state what further was said, and the following then occurred: "A. — and that he could not make up his mind exactly what he wanted to do; he felt he would like to go back to California, but that he at that time was not certain what he wanted to do, — he was not feeling any too well, — could I please get the apartment done as quickly as possible, as the apartment was not in a livable condition, and he said in the Spring he would know what he wanted to do. Mr. Davis [attorney for claimant]: Q. That is all that was said? A. That is all that was said. Mr. Davis: That is all. The witness: (Continuing) that he intended to stay. Mr. Moody [attorney for the estate]: I object on the further ground it is not rebuttal." Upon this so-called rebuttal testimony of Pearl Turner claimant bases his claim that Storey decided to remain in the apartment and to waive his right to cancel the lease. In In re Estate of Ranson, 304 Ill. App. 197, we had occasion to pass upon the evidence of admissions made by persons since dead. We there said (p. 162): "' * * * The Supreme Court of the United States, in Lee v. Polk County Comm'rs, 62 U.S. 493, observed that 'courts of justice lend a very unwilling ear to statements of what dead men have said.'"

"In the still later case of Megginson v. Megginson, 367 Ill. 168, the court affirmed this rule, and said (p. 180): 'We have recently had occasion to observe that the evidence of admissions made by persons since dead should be carefully scrutinized and considered with all the evidence in the case, as it is likely to be abused.' (Citing Fierke v. Elgin City Banking Co., 366 Ill. 66; Moreen v. Estate of Carlson, 365 Ill. 482.)

"In Davidson v. American Paper Mfg. Co., Inc., 188 La. 69, 175 So. 753, the court quoting from Bodenheimer v. Bodenheimer's Ex'rs, 35 La. Ann. 1005, observed: 'Extrajudicial admissions of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony is scarcely worthy of consideration.'"

We are satisfied that Pearl Neumer's testimony "is scarcely worthy of consideration." In this connection it will be remembered that when she was first upon the stand she did not testify that Mr. Storey told her "that he intended to stay," and when she testified "in rebuttal" it was only after considerable inducement by claimant's counsel that she finally gave the testimony upon which claimant now relies. The alleged statement of Mr. Storey, "that he intended to stay" is entirely inconsistent with everything else that the witness testified that Storey stated to her at the time.

The estate contends that "the retention of the check by the Claimant for $1,198 accompanying the notice of cancellation for a period of approximately four months constituted an acceptance by the Claimant of said check and of all of the terms and conditions on which it was delivered as set forth in said notice of cancellation." The claimant contends, "By retaining the check claimant did not concur in nor accept the attempted cancellation of the lease by the executors." The claimant seeks to evade the effect of the retention of the check by claiming that the attorney for claimant

"In the still later case of Strathman v. Strathman, 207 Ill. 163, the court affirmed this rule, and said (p. 180): 'We have recently had occasion to observe that the evidence of statements made by persons since dead should be carefully scrutinized and considered with all the evidence in the case, as it is likely to be biased.' (citing Marple v. Lincoln City Traction Co., 196 Ill. 66; Moreen v. Estate of Carlson, 167 Ill. 422.)

"In Davidson v. American Piano Mfg. Co., Inc., 139 Ia. 69, 117 So. 773, the court quoting from Rothschild v. Todhunter, 39 Ia. Ann. 1069, observed: 'Extrajudicial statements of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony is scarcely worthy of consideration.'"

We are satisfied that Pearl Vanner's testimony "is scarcely worthy of consideration." In this connection it will be remembered that when she was first upon the stand she did not testify that Mr. Storey told her "that he intended to stay," and when she testified "in rebuttal" it was only after considerable intervention by claimant's counsel that she finally gave the testimony upon which claimant now relies. The alleged statement of Mr. Storey, "that he intended to stay" is entirely inconsistent with everything else that the witness testified that Storey stated to her at the time.

The estate contends that "the retention of the check by the claimant for 21,198 accompanying the notice of cancellation for a period of approximately four months constituted an acceptance by the claimant of said check and of all of the terms and conditions on which it was delivered as set forth in said notice of cancellation." The claimant contends, "by retaining the check claimant did not concur in nor accept the attempted cancellation of the lease by the executors." The claimant seeks to evade the effect of the retention of the check by claiming that the attorney for claimant

through error did not inclose the check in claimant's letter of January 3, 1941. This was plainly an afterthought, as that letter makes no mention of a return of the check. But the claimant further contends that at the time the check was sent there was no dispute between the parties as to the payment of rent and, therefore, "even had claimant cashed the check it would not have been a satisfaction of the debt due." It is a sufficient answer to this contention to say that the check and the letter inclosing it, as claimant admits, created a dispute between the parties. Upon the receipt of the executors' letter of December 31, 1940, claimant's attorneys immediately challenged the right of the executors to cancel the lease, and the dispute between the parties as to the said right of the executors is the basis for the instant suit. Had claimant used the check it would have thereby admitted that the estate had the right to cancel the lease and that the sum of $1,198 constituted a payment in full of all rent due under the lease plus the sum of $148, the "cost of decorating apartment in accordance with lease." While it is true that a check is not intended for indefinite hoarding, we do not consider that it is necessary for us to pass upon the instant contention of the estate. Claimant contends that the trial court erred in allowing the witnesses W. T. Alden and Joseph E. Otis to testify that Mr. Storey told them that he was going to terminate the lease and go to California, and claimant argues that the trial court may have been influenced in deciding the case by this testimony. It may be conceded that the said testimony was not competent. The trial court seems to have adopted a liberal attitude in receiving the evidence of both parties. He permitted claimant's witness Pearl Neumer to testify in so-called rebuttal when her testimony was not rebuttal evidence, and the court so stated. We have no trouble in deciding this case upon evidence aside from that given by Mr. Alden,

through error did not inclose the check in plaintiff's letter of January 3, 1941. This was plainly an afterthought, as most letters makes no mention of a return of the check. But the claimant further contends that at the time the check was sent there was no dispute between the parties as to the payment of rent and, therefore, "even had claimant cashed the check it would not have been a satisfaction of the debt due." It is a sufficient answer to this contention to say that the check and the letter inclosing it, as claimant admits, created a dispute between the parties. Upon the receipt of the executors' letter of December 31, 1940, claimant's attorneys immediately challenged the right of the executors to cancel the lease, and the dispute between the parties as to the said right of the executors is the basis for the instant suit. The claimant used the check it could have thereby admitted that the estate had the right to cancel the lease and that the sum of $1,198 constituted a payment in full of all rent due under the lease plus the sum of $148, the "cost of decorating apartment in accordance with lease." While it is true that a check is not intended for indefinite boarding, we do not consider that it is necessary for us to pass upon the instant contention of the estate. Claimant contends that the trial court erred in allowing the witnesses W. T. Eldon and Joseph E. Otis to testify that Mr. Storey told them that he was going to terminate the lease and go to California, and claimant argues that the trial court may have been influenced in deciding the case by this testimony. It may be conceded that the said testimony was not competent. The trial court seems to have adopted a liberal attitude in receiving the evidence of both parties. He permitted claimant's witness Pearl Demmer to testify in so-called rebuttal when her testimony was not rebuttal evidence, and the court so stated. We have no trouble in deciding this case upon evidence aside from that given by Mr. Eldon,

Mr. Otis and Pearl Neumer, and we are satisfied that the trial court decided the case upon the competent and relevant evidence.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

42301

JOSEPH G. JOLICOEUR,)
Appellant,)
) APPEAL FROM CIRCUIT COURT,
v.)
) COOK COUNTY.
NELSON H. BROWN et al.,)
Appellees.)

317 I.A. 381

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

"The plaintiff filed his complaint in equity *** against Nelson H. Brown and Dorothy Brown, to establish a trust in certain real estate." Answers were filed by the defendants, to each of which plaintiff filed a reply. Upon a hearing before the court, at the conclusion of plaintiff's case, upon motion of defendants, a decree was entered dismissing the complaint for want of equity. Plaintiff appeals.

The facts essential to a determination of this appeal appear from testimony given by plaintiff and from testimony offered by him but excluded by the court. On March 26, 1934, plaintiff and defendant Nelson H. Brown, hereinafter called defendant Brown, entered into a written agreement of partnership for the operation of a hotel leasehold at 1322-26 East 47th street, Chicago, Illinois, "or some other premises mutually acceptable," and to use certain furniture and furnishings owned by plaintiff in the conduct of the proposed business. A lease for the premises was to be executed jointly and to be acceptable to both parties and upon the signing of the same the partnership agreement was to come into force and effect. All receipts from the enterprise were to be deposited in a joint bank account and all disbursements were to be made by check. The agreement further provided:

"10. It is mutually understood and agreed that the SPECIFIC INTENT of this partnership shall be that each party hereto shall have an equal amount invested in capital and labor, that each shall profit equally, and that in the event of a loss that each shall equally bear such loss, and particularly that at all times

vs.

Appellant,

V.

Appellees.

6. Public Service Employing the services of the court.

"The plaintiff filed his complaint in equity --- against Helen E. Brown and Dorothy Brown, to establish a trust in certain real estate." Answers were filed by the defendants, to each of which plaintiff filed a reply. Upon a hearing before the court, at the conclusion of plaintiff's case, upon motion of defendants, a decree was entered dismissing the complaint for want of equity. Plaintiff appeals.

The facts essential to a determination of this appeal appear from testimony given by plaintiff and from testimony offered by his own witnesses by the court. On March 16, 1924, plaintiff and defendant Helen E. Brown, hereinafter called defendant Brown, entered into a written agreement of partnership for the operation of a hotel located at 1322-26 East 47th street, Chicago, Illinois, "or some other premises mutually acceptable," and to use furniture furniture and furnishings owned by plaintiff in the conduct of the proposed business. A lease for the premises was to be executed jointly and to be acceptable to both parties and upon the signing of the same the partnership agreement was to come into force and effect. All receipts from the enterprise were to be deposited in a joint bank account and all disbursements were to be made by check. The agreement further provided:

"10. It is mutually understood and agreed that the monetary interest of this partnership shall be that each party hereto shall have an equal amount invested in capital and labor, that each shall profit equally, and that in the event of a loss that each shall equally bear such loss, and particularly that at all times

that the partnership shall be on a FIFTY-FIFTY BASIS.

"11. It is mutually understood and agreed that this partnership agreement shall apply only in connection with the establishment of the leasehold and hotel business referred to herein, and shall not extend beyond the operation of this particular enterprise." When the parties were not able to obtain a lease for the 47th street premises they authorized, in writing, a real estate broker named Barnes to negotiate a lease for the two six apartment buildings located at 6330-32 and 6334-36 Ingleside avenue, Chicago, Illinois, and subsequently the parties entered into a lease for the premises, 6330-32 Ingleside avenue, with Thomas Zuris, the owner of the same, for a period of five years from June 1, 1934. Plaintiff offered to prove that prior to the execution of this lease he had a conversation with defendant Brown in which he told him that Zuris, the owner of both premises, had stated to plaintiff that he did not care to rent both buildings to them until he had had an opportunity to observe how they would operate one of the buildings and that he would lease to them 6330-32 Ingleside avenue for five years and if it appeared within a year or so that they were successful in the operation of the business he would then give them a lease for the other building to run concurrently with the lease for 6330-32. An objection to this testimony was sustained by the court. Plaintiff also offered to prove that the two buildings adjoined each other and were separated by a common party wall, but defendants' objection to the testimony was sustained. In the spring of 1936 defendant Brown and Zuris executed a lease for 6334-36 Ingleside avenue, in which Brown was the lessee, and he operated a rooming house in said premises, in his own behalf. Plaintiff testified that some time later he heard, for the first time, of this transaction and that he told defendant Brown that they had contemplated taking that building, to which defendant Brown answered, "I took it for myself, so what are you going to do about it?" Plaintiff further testified that he did nothing about the matter

that the partnership shall be as a first-class hotel.

"11. It is mutually understood and agreed that this partnership agreement shall apply only in connection with the operations of the Innsbruck and Sofal hotelsin Pittsburg to hotels, and shall not extend beyond the operation of this particular enterprise."

When the plaintiffs were not able to obtain a lease for the 6th street premises they authorized, in writing, a real estate broker named Barnes to negotiate a lease for the two six apartment buildings located at 6130-32 and 6134-36 Inglewood avenue, Oakland, California, and subsequently the parties entered into a lease for the premises, 6130-32 Inglewood avenue, with Thomas Davis, the owner of the same, for a period of five years from June 1, 1924. Plaintiff offered to prove that prior to the execution of this lease he had a conversation with defendant from in which he told the Davis, the owner of both properties, but stated to plaintiff that he did not care to rent both buildings to them until he had an opportunity to discover how they would operate one of the buildings and that he would lease to them 6130-32 Inglewood avenue for five years and if it operated within a year so that they were successful in the operation of the business he would then give them a lease for the other building in run concurrently with the lease for 6130-32. An objection to this testimony was sustained by the court. Plaintiff also offered to prove that the two buildings adjoined each other and were operated by a common party wall, but defendants' objection to the testimony was sustained. In the spring of 1924 defendant broke and gave a lease for 6134-36 Inglewood avenue, in which Davis was the lessee, and he operated a running house in said premises, in his own behalf. Plaintiff testified that some time later he found, for the first time, of this transaction and that he told defendant Brown that they had been misled thinking that building, to which defendant Brown answered, "I took it for myself, so what are you going to do about it?" Plaintiff further testified that he did nothing about the matter

at the time except to protest and that he did not discuss the matter with defendant Brown thereafter; that he first learned that Zuris was not the owner of the properties in question when Zuris's attorney notified him, in April, 1939, that defendant Brown had purchased both properties in December, 1937; that Brown had never notified him that he had purchased both buildings. While the properties were taken in the name of defendant Dorothy Brown, plaintiff's evidence tends to support his contention that "consideration for payment of the properties was supplied by the defendant Nelson H. Brown." Plaintiff's evidence also tends to support his further contention that "defendant Brown continuously operated a rooming house in the property 6334-36 Ingleside Avenue from the time he acquired a lease thereon in 1936 and after the transfer of title to both pieces of property to his daughter he continued his operation of the rooming house at 6334-36 Ingleside, and when the lease on the partnership property expired in 1939 he took over that property and at the time of the trial was operating both properties as a rooming house."

Plaintiff states his theory of the case as follows: "That Nelson H. Brown as co-partner of the plaintiff occupied a fiduciary relationship toward the plaintiff which forbade him from purchasing the real estate which was the subject matter of the partnership, or the property adjacent thereto, during the existence of the partnership and holding the same adversely to the plaintiff during and after the termination of the period for which the partnership was organized, and that the entire consideration for the conveyance having been furnished by the defendant, Nelson H. Brown, placing the title to the property in the name of Dorothy Brown was but a subterfuge to accomplish indirectly a result which a court of equity would unhesitatingly denounce if title had been taken in the name of Nelson H. Brown who was a partner of the plaintiff at the time title was taken in the name of his daughter;" that "the fundamental legal

at the time consist of gypsum and that he did not discuss the matter with defendant Irene Garrettson; that he first learned that Ruth was not the owner of the properties in question when Ruth's attorney notified him, in April, 1970, that purchased Irene had purchased both properties in December, 1967; that Irene had never notified him that he had purchased both properties. While the properties were taken in the name of defendant Irene Garrett, plaintiff's evidence tends to support his contention that "considerations for payment of the properties was supplied by the defendant Helen R. Irene." Plaintiff's evidence also tends to support the further contention that "defendant Irene Garrettson deposited a rooming house in the property 6114-36 Indianola Avenue from the time he acquired it from Irene Garrett in 1970 and after the transfer of title to both places of property to his daughter he continued his operation of the rooming house at 6114-36 Indianola, and when the lease on the particular property expired in 1972 he took over that property and at the time of the trial was operating both properties as a rooming house."

Plaintiff states his theory of the case as follows: "That Helen R. Irene as co-partner of the plaintiff operated a rooming relationship toward the plaintiff which formed the from prohibiting the real estate which was the subject matter of the partnership, or the property adjacent thereto, during the existence of the partnership and holding the same adversely to the plaintiff during and after the termination of the period for which the partnership was organized, and that the rooming arrangements for the conveyance having been furnished by the defendant, Helen R. Irene, placing the title to the property in the name of Irene Garrett was for a subterfuge to successfully fraudulently a rental which a owner of equity would unwittingly encumber if title had been taken in the name of Helen R. Irene who was a partner of the plaintiff or the other title was taken in the name of his daughter; that "the fraudulent legal

question which underlies the claim of the plaintiff is, did the defendant Brown occupy toward the plaintiff a business relationship, fiduciary in character, which forbade him from purchasing during the existence of the partnership the real estate which was the subject matter of the partnership, or the property adjacent thereto, and holding the same adversely to the plaintiff after the termination of the period for which the lease was first made."

We have before us, therefore, a case in which plaintiff's evidence shows that defendant Brown did not purchase the properties with partnership funds nor for partnership purposes. Plaintiff claims that under such a state of facts equity will declare that plaintiff "holds the title in trust for the partnership upon reimbursement of a fair pro-rata of his disbursements by the remaining partner."

In Thanos v. Thanos, 313 Ill. 499, in which one partner claimed the benefit of a constructive trust as to certain real estate, the court said (p. 505): "The evidence shows that this property was not bought with partnership funds, but that the purchase price was paid by appellant from private funds which had been set aside to him as his share of the profits from the partnership business. While the lease on this building and the right of the partnership to renew the same are partnership assets, this does not affect the right of appellant to secure and hold as his individual property the fee to the premises. The mere fact that appellant and appellee were partners in the restaurant business did not make real estate purchased by one of them partnership property. To make the building partnership property it must have been purchased with partnership funds for partnership purposes, or at least there must have been one of such elements present. Blakeslee v. Blakeslee, 265 Ill. 48; Robinson Bank v. Miller, 153 id. 244; Alkire v. Kahle, 123 id. 496." The court further stated (p. 504): "The law is well settled that one claiming the benefit of a constructive trust must establish it by clear and

question which underlies the claim of the plaintiff is, did the defendant Essex County Council the plaintiff a business relationship, fiduciary in character, which forbade him from purchasing during the existence of the partnership the real estate which was the subject matter of the partnership, or the property adjacent thereto, and holding the same adversely to the plaintiff after the termination of the period for which the lease was first made.'

We have before us, therefore, a case in which plaintiff's evidence shows that defendant Essex did not purchase the property with partnership funds nor for partnership purposes. Plaintiff claims that under such a state of facts equity will declare the plaintiff "holds the title in trust for the partnership upon the termination of a trip pro-rata of his disbursements by the remaining partner."

In Thorne v. Thorne, 313 Ill. 499, in which one partner claimed the benefit of a constructive trust as to certain real estate, the court said (p. 505): "The evidence shows that this property was not bought with partnership funds, but that the purchase price was paid by appellant from private funds which had been set aside by the as his share of the profits from the partnership business. While the laws on this subject and the right of the partnership to pursue the same are partnership assets, this does not affect the right of appellant to secure and hold as his individual property the fee to the premises. The mere fact that appellant and appellee were partners in the restaurant business did not make real estate purchased by one of them partnership property. To make the holding partnership property it must have been purchased with partnership funds for partnership purposes, or at least there must have been one of such elements present. Pflederer v. Pflederer, 261 Ill. 48; Anderson Lumber Co. v. Miller, 187 Ia. 1044; Jiggins v. Jiggins, 117 Ia. 470." The court further stated (p. 506): "The law is well settled that the claiming the benefit of a constructive trust must establish it by clear and

convincing proof. If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of the trust, it is not sufficient to support a decree declaring and enforcing the trust. This rule was established for the purpose of stablizing real estate titles." In Blakeslee v. Blakeslee, supra, the court said (pp. 53, 54): "The general doctrine of the cases seems to be that the purchase of lands with partnership funds is necessary to make it firm property, but this rule will give way, in equity, where it clearly appears the land was intended by the parties to be firm property and was so considered and treated by them. In order, however, to come within the exceptions to the general rule the intention of the parties must be clear and explicit." Robinson Bank v. Miller, supra, shows how carefully our Supreme court has adhered to the general principles that govern a case like the instant one. To quote from the opinion of the court (p. 254):

"In the case at bar, the land was not purchased with partnership funds. The undivided one third interest bought by John S. Emmons was paid for by him with his own individual money. Miller also paid for the one undivided one third interest, purchased by him, with his individual funds. None of the money of the firm of Newton, Emmons & Miller was contributed towards the purchase of the one third interest held by Newton. Indeed, the proof shows, that the firm of Newton, Emmons & Miller was formed by an oral agreement after Emmons and Miller had bought their interests. Each partner here held the title to an undivided one third part of the property. No entries were made upon the books of the firm, showing that the real estate was treated as firm assets. The evidence, however, does show that the property was bought for the purpose of being used in the milling business, and that, after its purchase, it was used for firm purposes, and that the firm gave its notes to pay for repairs and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual

convincing proof. If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of the trust, it is not sufficient to support a decree enforcing and declaring the trust. This rule was established for the purpose of invalidating real estate titles." In Blackstone v. Blackstone, supra, the court, said (pp. 53, 54): "The general doctrine of the cases seems to be that the purchase of lands with partnership funds is sufficient to make it firm property, but this rule will give way, in equity, where it clearly appears the land was intended by the parties to be firm property and was so conducted and treated by them. In order, however, to come within the exception to the general rule the intention of the parties must be clear and explicit." Dickerson v. Miller, supra, where has carefully our supreme court has adhered to the general principles that govern a case like the instant one. To quote from the opinion of the court (p. 224):

"In the case at bar, the land was not purchased with partnership funds. The individual one third interest belonging to John C. Dickerson was paid for by him with his own individual money. Miller also paid for the one undivided one third interest, possessed by him, with his individual funds. Prior to the money of the firm of Brown, Dickerson & Miller was contributed towards the purchase of the one third interest held by Brown. Indeed, the proof shows, that the firm of Brown, Dickerson & Miller was formed in no real sense after Dickerson and Miller had bought their interests. Each partner here held the title to an undivided one third part of the property. No entries were made upon the books of the firm, showing that the real estate was treated as firm assets. The evidence, however, does show that the property was needed for the purpose of being used in the milling business, and that, after its purchase, it was used for firm purposes, and that the firm gave its notes to pay for repairs and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual

property of the partners holding as tenants in common?" The court, after reviewing the authorities bearing upon the question before it, said (pp. 257, 258):

"The weight of authority seems to us to support the position, that, where persons, who afterwards become partners, buy land in their individual names, and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think, that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property."

Counsel for plaintiff seek to distinguish the Thanos case from the instant one upon the ground that the Thanos case was decided only after a full hearing and consideration of conflicting evidence, but we are unable to see how that fact changes the general principles of law stated by the court. The Thanos case merely followed settled principles of law.

Plaintiff contends that Hand v. Allen, 294 Ill. 35, is "a case involving substantially the same points as this case," and that the decision in that case favors plaintiff's claim. We do not agree with counsel as to the effect of that decision. The Hand case involved the dissolution of a partnership between Hand and Allen and an accounting. Pilkey and Hosking were made defendants to the bill as amended which prayed that their interests, if any, should be ascertained and declared. There was a written partnership agreement between Hand and Allen for the acquisition and operation of ferro manganese mines in Lower California. Hand went to Lower California and acquired some leases and mined and shipped some ore, but in a few months he was obliged to shut down the mine because of the Mexican embargo on the

property or the partners taking as tenants in common? The court, after providing the indentures by holding that the question which it said (p. 377, 378):

"The validity of an identify arises in so to regard the conclusion that, where persons, who otherwise common partners, may land to take individual shares, and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and unmistakable agreement subsequently entered into by them to make it form property or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think, that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property."

Counsel for plaintiff seek to distinguish the Thomas case from the instant one upon the ground that in Thomas there was invoked only after a full hearing and consideration of conflicting evidence, and we are unable to see how that fact changes the general principles of law stated by the court. The Thomas case merely followed settled principles of law.

Plaintiff contends that in this, the 3d, is "a case involving substantially the same points as this case," and that the decision in that case favors plaintiff's claim. We do not agree with counsel as to the effect of that decision. The Thomas case involved the dissolution of a partnership between Ward and Allen and an accounting. Ellery and Thomas were made defendants in the bill as executor which prayed that their interests, if any, should be ascertained and declared. There was a written partnership agreement between Ward and Allen for the acquisition and operation of fruit orchards where in lower California. Ward went to lower California and acquired some lands and planted and cultivated some orc, but in a few months he was obliged to leave there the same because of the Mexican authorities on the

exportation of manganese ore. Hand claimed that by agreement between him and Allen they extended their contract to other territories and other business and for a longer period than was contemplated in the original agreement; that Allen caused the Western Ore & Mining Company to be incorporated and the Montana mines which had been acquired to be conveyed to it, and that he has since operated the mines and extracted ore from them of great value but that he refused to permit the issue of stock to Hand or to account to the latter for the profits made. Allen claimed that the partnership agreement for mining in Lower California was not extended to operations in Montana and was terminated on May 1, 1917. The Supreme court, in its opinion, held (pp. 40, 41): "The business of the partnership in Lower California resulted in a loss of about $11,000 when the mining operations were abandoned. Hand could base no rights in the purchase and operation of mines in Montana upon this agreement by itself, but he and Allen could by agreement extend their contract to other countries and other business and for a longer time than originally contemplated, or change its terms, as they might deem advisable, and such variations of the contract, if made, may be shown not only by evidence of an express agreement but by evidence of the conduct of the parties. Robbins v. Laswell, 27 Ill. 365." The opinion further holds (pp. 44, 45):

"While Hand and Allen contradict one another throughout their testimony in many important particulars, the corroborating evidence, when there is any, usually supports Hand. If Hand's testimony is believed, there is ample evidence to sustain the finding that the partnership was extended to include the Montana transactions, and other evidence, oral and documentary, tends to support this evidence. The chancellor had the advantage of hearing both Hand and Allen testify, and we cannot say from a consideration of all the evidence that the finding that the business of the co-partnership of Hand and Allen, doing business under the name of the Pacific Ore Company,

expectations of management are. Good relations lack or strained between the and allen they extended their authority to minor participants and other business and for a longer period than was contemplated in the original agreement. Thus allen should be regarded the A Radio Company is be interpreted as a [illegible] which was [illegible] entered to be accepted in it, for that is the [illegible] the above and referred are from time of great value and there is reason to permit the issue or press to [illegible] the issues for the public good. Allen stated that the partnership agreement for making in Lower California was not intended to specifications in Mexico and was terminated on May 5, 1927. The Supreme Court, in its opinion, held (re. 61, 62): "The business of the partnership in Lower California resulted in a loss of about $11,000 when the mining operations were abandoned. Good faith here no rights in the property and operations of mines in Mexico upon this agreement by Harry, yet he and Allen would by agreement [illegible] their interest in other properties and other business and for a longer time than originally contemplated, or change its terms, as they might deem advisable, and such modifications of the contract, if made, may be proven not only by evidence of an express agreement but by evidence of the conduct of the parties. Hopkins v. Lowell, 17 Ill. 161." The opinion further notes (re. 64, 65):

"Will Good and Allen continued one another throughout their testimony in many important particulars, the corroborating evidence, when there is any, usually supports Good. If Good's testimony is believed, there is ample evidence to sustain the finding that the partnership was extended to include the Indian Creek, and other evidence, oral and documentary, tends to support this evidence. The chancellor had the advantage of hearing both Good and Allen testify, and we cannot say from a consideration of all the evidence that the finding that the business of the co-partnership of Good and Allen, during business within the area of the Pacific Ore Company,

should be extended to and include the operation of any claims or mines which might be procured on behalf of the partnership and which the partnership might decide could be operated with profit, was manifestly contrary to the weight of the evidence. On the contrary, we regard it a fair deduction from the evidence."

The ruling in the Hand case does not run counter to the rule laid down in Thanos v. Thanos and other cases.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

should be extended to not include the operation of any claims or crimes which might be proposed on behalf of the plaintiff and which the defendants might claim would be operative with respect, the manifestly contrary to the intent of the statutes. On the contrary, we regard it a fair construction of the statutes.

The ruling in the Dent case, and the decision in the Hall land down in Thomas v. Thomas and other cases.

The decree of the circuit court of Cook county is affirmed.

Judgment affirmed.

Mulkey, C. J., and Craven, J., concur.

42374

GEORGE LOVE,
Appellant,

v.

GOLDENBERG FURNITURE COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

George Love, plaintiff, filed a complaint for false imprisonment against Goldenberg Furniture Company, a corporation, defendant. Defendant filed a motion to dismiss the complaint and an order was entered dismissing it. Plaintiff appeals.

The complaint alleges that about February 15, 1940, plaintiff was a person of good repute and "had never been guilty of or accused of any unfair dealings;" that about April 27, 1937, he purchased various articles of household goods from defendant and engaged to pay $300 for them by instalment payments and that he made instalment payments until the $300 had been reduced to $115; that in 1939 he, in copartnership with his brothers, opened up and operated a grocery store at 5656 South State street, in Chicago, but that in August, 1939, the venture failed and plaintiff was sued for possession of the premises because of his inability to pay rent, and judgment for possession was rendered in the Municipal court of Chicago against him and a writ of restitution issued on said judgment; that the goods which he had purchased from defendants were on said premises and plaintiff being unable to continue his payment of instalments on said goods notified defendant about September 1, 1939, to repossess itself of said goods and hold them until plaintiff could resume his payments, but defendant refused to accept the return of the goods, whereupon plaintiff placed them in the warehouse of the American Storage Company and notified defendant that the goods were thus stored; that although defendant

42374

GEORGE LOVE, Appellant,	)	
v.	)	APPEAL FROM THE MUNICIPAL COURT
GOLDENBERG FURNITURE COMPANY, a corporation, Appellee.	)	OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

George Love, plaintiff, filed a complaint for false imprisonment against Goldenberg Furniture Company, a corporation, defendant. Defendant filed a motion to dismiss the complaint and an order was entered dismissing it. Plaintiff appeals.

The complaint alleges that about February 15, 1940, plaintiff was a person of good repute and "had never been guilty of or accused of any unfair dealings;" that about April 27, 1937, he purchased various articles of household goods from defendant and engaged to pay $300 for them by instalment payments and that he made instalment payments until the $300 had been reduced to $115; that in 1939 he, in copartnership with his brothers, opened up and operated a grocery store at 5636 South State street, in Chicago, but that in August, 1939, the venture failed and plaintiff was sued for possession of the premises because of his inability to pay rent, and judgment for possession was rendered in the Municipal court of Chicago against him and a writ of restitution issued on said judgment; that the goods which he had purchased from defendants were on said premises and plaintiff being unable to continue his payment of instalments on said goods notified defendant about September 1, 1939, to repossess itself of said goods and hold them until plaintiff could resume his payments, but defendant refused to accept the return of the goods, whereupon plaintiff placed them in the warehouse of the American Storage Company and notified defendant that the goods were thus stored; that although defendant

had knowledge that its goods were so stored it filed suit against plaintiff in the Municipal court of Chicago, under the title of "Goldenberg Furniture Company, a corporation, Plaintiff, v. George Love, Defendant, #2859942;" that a copy of the statement of claim filed therein, marked plaintiff's Exhibit One, is "attached to this complaint and made a part hereof;" that in said statement of claim defendant alleged that "the defendant, (meaning plaintiff herein), wilfully, fraudulently and maliciously refused to deliver them (meaning the goods purchased by the plaintiff from the defendant) up to the plaintiff, (meaning the defendant herein), and thereby converted the same to his own use, and wrongfully, wilfully, fraudulently and maliciously deprived the plaintiff (meaning the defendant herein) of the same;" that all of these allegations were false and wilfully malicious; that prior to the filing of said defendant's suit against plaintiff, defendant had knowledge that its said goods were in said Storage Company's warehouse; that defendant's suit was filed on October 13, 1939, and on September 29, 1939, plaintiff received a letter from said Storage Company advising him that said Storage Company had received a letter from defendant inquiring of the goods which plaintiff had stored with said Storage Company and which fact plaintiff had communicated to defendant, a copy of which letter is marked plaintiff's Exhibit Two and "attached to this complaint and made a part hereof."

"6. That when said case in the Municipal court of Chicago filed by the defendant against the plaintiff came up for hearing, plaintiff and his counsel were not present, and judgment by default was entered against him, and thereafter, a capias issued out of the Municipal Court of Chicago on said judgment returnable on February 5, 1940, and plaintiff was brought into the Municipal Court of Chicago on said capias, and was, on February 5, 1940, committed to the County Jail by the bailiff of said Municipal

had knowledge that its goods were in storage at Pilsen and against plaintiff in the municipal court of Chicago, under the title of "Goldenberg Furniture Company, a corporation, Plaintiff, v. Joseph Levy, Defendant, #[illegible];" that a copy of the statement of claim filed therein, marked plaintiff's Exhibit one, is "[illegible] this complaint and made a part hereof;" that in said statement of claim defendant alleged that "the defendant, (meaning plaintiff herein), wrongfully, fraudulently and maliciously refused to deliver them (meaning the goods purchased by the plaintiff from the defendant) up to the plaintiff, (meaning the defendant herein), and thereby converted the same to his own use, and wrongfully, wilfully, fraudulently and maliciously deprived the plaintiff (meaning the defendant herein) of the same;" that all of these allegations were false and wilfully malicious; that prior to the filing of said defendant's suit against plaintiff, defendant had knowledge that its said goods were in said Storage Company's warehouse; that defendant's suit was filed on October 11, 1939, and on September 20, 1939, plaintiff received a letter from said Storage Company stating the that said Storage Company had received a letter from defendant inquiring of the goods which plaintiff had stored with said Storage Company and which that plaintiff had communicated to defendant, a copy of which letter is marked plaintiff's Exhibit Two and "attached to this complaint and made a part hereof."

"6. That some said case in the Municipal Court of Chicago filed by the defendant against the plaintiff came up for hearing, plaintiff and his counsel were not present, and judgment by default was entered against him, and therefore, a regular issued out of the Municipal Court of Chicago on said judgment returnable on February 3, 1940, and plaintiff was brought into the Municipal Court of Chicago on said capias, and was, on February 3, 1940, committed to the County Jail by the bailiff of said Municipal

Court by virtue of the said capias ad satisfaciendum, and remained in the County Jail from February 5, 1940, to April 2, 1940, inclusive.

"7. That on April 4, 1940, a petition for writ of habeas corpus was filed in the Circuit Court of Cook County, Illinois, in Case #40-C-3145 and that upon a final hearing on the said writ, plaintiff was discharged from further custody after plaintiff had been confined in the County Jail of Cook County, Illinois for a period of forty-one days.

"8. That the defendant well knew that he, the plaintiff, had not been guilty of wilfully, fraudulently and maliciously concealing any of defendant's goods at the time the said suit was filed by defendant against plaintiff in the Municipal Court of Chicago, and also at the time the defendant sued out said capias to attach the body of plaintiff, and at the time plaintiff was committed to the County Jail by virtue of the false, malicious and fraudulent action of the defendant.

"9. That while he was so imprisoned in the County Jail, he suffered greatly in body and mind, was humiliated, permanently lost the association of his then wife, was deprived of the opportunity of engaging in any lawful business pursuits and of any gainful employment and lost his home.

"10. Wherefore, plaintiff states that he has been damaged in the sum of $25,000, and therefore he brings this suit."

Exhibit One, attached to the complaint, reads as follows:

"IN THE MUNICIPAL COURT OF CHICAGO - First District.

"GOLDENBERG FURNITURE COMPANY, A CORPORATION Plaintiff	)	No. 2859942
vs.	)	Amount Claimed $200.00
GEORGE LOVE Defendant	)	

"PRAECIPE

"The clerk will issue a summons in the usual form requiring the appearance of the defendant, at or before 9:30 A. M. on the 24th

Court by virtue of the writ issued pursuant thereto, and received in the County Jail from custody; that, on April 3, 1944, instantly.

7. That on April 4, 1944, a petition for writ of habeas corpus was filed in the Circuit Court of Cook County, Illinois, in case No.-C-1147 and that upon a final hearing on the said writ, plaintiff was discharged from further custody after plaintiff has been confined in the County Jail of Cook County, Illinois for a period of forty-one days.

8. That the defendant will deny that he, the plaintiff, has not been guilty of nullity, frivolously and maliciously commencing any of defendant's goods in the time the said suit was filed by defendant against plaintiff in the municipal court of Chicago, and also at the time the aforesaid suit was also replies to attach the body of plaintiff, and at the time plaintiff was committed to the County Jail by virtue of the false, malicious and groundless action of the defendant.

9. That while he was so imprisoned in the County Jail, he suffered great pain in body and mind, was humiliated, permanently lost the association of his home life, was deprived of his opportunity of engaging in any lawful business pursuits and of any gainful employment and lost his home.

10. Therefore, plaintiff avers that he has been damaged in the sum of $15,000, and therefore he brings this suit."

Subject was, attached to the complaint, proof as follows:

"IN THE MUNICIPAL COURT OF CHICAGO - FIRST DIVISION.

"Plaintiff, A Corporation, vs. Defendant	No. Judgment Amount Claimed $200.00

"AFFIDAVIT

"The claim will issue a summons in the usual form requiring the appearance of the defendant, at or before 9:30 A. M. on the 24th

day of October, 1939

"RUBENSTEIN, HAGGERTJOS & MONARCH
Attorney for Plaintiff

"Address for Service and Telephone 100 No. LaSalle Street,
Fra. 1052

"STATEMENT OF CLAIM

"The plaintiff claims as follows:

"1. On May 8, 1939, the defendant was in possession of the plaintiff's goods of the value of TWO HUNDRED DOLLARS ($200.00), consisting of the following:

"1 walnut bed, dresser and chest; 1 coil spring; 1 Seneca Mattress; 1 walnut dining table and 5 chairs; 1 Velvet rug 9x12 rtst; 1 Rust Sofa bed; 1 Jute Rug Pad 9x12;

"2. On that day the plaintiff verbally demanded the said goods of the defendant, but the defendant wilfully, fraudulently and maliciously refused to deliver them up to the plaintiff and thereby converted the same to his own use and wrongfully, wilfully, fraudulently and maliciously deprived the plaintiff of the same.

"PLAINTIFF CLAIMS TWO HUNDRED DOLLARS ($200.00) DAMAGES."

Exhibit Two, attached to the complaint, reads as follows:

"Sept. 29, 1039 [1939]

"Mr. Geo Love,
"5238 Indiana Ave.
"Chicago, Ill.

"Dear Mr. Love:

"Please be advised that we are in receipt of the letter from the Goldenberg Furniture Co. -1837-39 S State St., wherein they advise us of the following articles, stored in our warehouse, covered by a conditional Bill of Sale; No. 70 bed; No. 70 dresser; No. 70 Chest; No 429 Spring; Seneca Mattress; No. 122o/ Spec. 7pc/ dining set; No. 3514H-9x12 rug; 9x12 pad; Rust Sofe Bed.

"Kindly advise us by letter if this is so, and we must have a written authorization from you whether it is satisfactory with you for us to relinquish these goods when they decide to remove them from our warehouse.

day of October, 1939

"WHEREFORE, PLAINTIFF'S CLAIM
AGAINST THE DEFENDANT

"Address for Service and Telephone: Mr. G. Lionel Tavey,
Ft. 1000

"STATEMENT OF CLAIM

"The plaintiff claims as follows:

"1. On May 5, 1939, the defendant was in possession of the plaintiff's goods of the value of two thousand [illegible], consisting of the following:

"1 walnut bed, dresser and chest; 1 pair [illegible] 1 [illegible] 1 walnut dining table and 3 chairs; 1 [illegible] 1 [illegible] 1 [illegible] bed; 1 [illegible] 1 [illegible];

"2. On that day the plaintiff wrongfully detained the said goods or the defendant, but the defendant rightfully, fraudulently and maliciously refused to deliver them up to the plaintiff and thereby converted the same to his own use and [illegible], illegally, fraudulently and maliciously deprived the plaintiff of the same.

"PLAINTIFF CLAIMS THE [illegible] DOLLARS (Ten,[illegible]) [illegible]."

Exhibit Two, attached to the complaint, reads as follows:

"Nov. 7th, 1939!

"Mr. Lee Love,
[illegible] Ludlow Ave.
"Chicago, Ill.

"Dear Mr. Love:

"Please be advised that we are in receipt of the letter from the Collection Bureau [illegible] -1937-39 [illegible], wherein they advise us of the following situation, stated in our vernacular, caused by a commitment all or only [illegible]. To [illegible] [illegible]. To [illegible] [illegible] [illegible]. 1[illegible] [illegible] [illegible] [illegible].

"Kindly advise us by letter if this is so, and we must have a written authorization from you whether it is satisfactory with you for us to retaliate these goods when they [illegible] to remove them from our warehouse.

"Trusting you give this matter your immediate attention, we are,

"Yours very truly,
"American Storage Co.
"V. Wisceglia, Mrg."

Defendant filed the following motion to dismiss the instant complaint:

"Now comes, GOLDENBERG FURNITURE COMPANY, a corporation, by RUBENSTEIN, HAGGENJOS & MONARCH, its attorneys and moves that the above entitled action be dismissed and for grounds of said motion shows as follows:

"1. Said Complaint does not allege that the cause of action, as alleged in Plaintiff's complaint, entitled GOLDENBERG FURNITURE COMPANY, a corporation vs. GEORGE LOVE, Municipal Court of Chicago, case #2859942 (hereinafter referred to as original cause of action) was terminated in favor of Plaintiff herein.

"2. That plaintiff's complaint does not allege that the judgment in the original action in favor of defendant herein and against the plaintiff GEORGE LOVE was ever modified, reversed or set aside.

"3. Plaintiff admits in his Complaint that the capias in the original cause of action had issued out of the Municipal Court of Chicago on said judgment and that said capias was accordingly served by the Bailiff of the Municipal Court of Chicago.

"4. Plaintiff, GEORGE LOVE admits by his complaint that prior to his being committed to the County Jail by virtue of the capias ad satisfaciendum issued out of the Municipal Court of Chicago, he appeared before one of the Judges of the Municipal Court of Chicago and had a hearing on said Capias.

"5. Plaintiff's Complaint fails to allege any want of probable cause.

"6. Plaintiff's Complaint fails to show malice on the part of the defendant herein.

"7. Plaintiff admits by his Complaint that the Municipal

"Trusting you give this matter your immediate attention,

we are,

"Yours very truly,
"American Storage Co.
"By, Blackfield, Sec."

Defendant filed the following motion to dismiss the instant complaint:

"Now comes, Defendant (Motion Omitted), a corporation, by (Motion Omitted), Counsel & Attorney, its attorneys and moves that the above entitled action be dismissed and for reasons of said motion states as follows:

"1. Said Complaint does not allege that the cause of action, as alleged in Plaintiff's complaint, accrued within Fourteen Years, a corporation vs. Robert Lord, municipal Court of Chicago, case (Motion Omitted) (hereinafter referred to as original cause of action) was terminated in favor of Plaintiff herein.

"2. That plaintiff's complaint does not allege that the judgment in the original action in favor of Defendant herein and against the plaintiff herein (Motion Omitted) was ever modified, reversed or set aside.

"3. Plaintiff admits in his Complaint that the cause in the original cause of action had issued out of the Municipal Court of Chicago on said judgment and that said cause was eventually served by the Sheriff of the Municipal Court of Chicago.

"4. Plaintiff, Robert Lord admits by his complaint that prior to the notice committed to the County Jail by virtue of the capias ad satisfaciendum issued out of the Municipal Court of Chicago, he appeared before one of the Judges of the Municipal Court of Chicago and had a hearing on said Capias.

"5. Plaintiff's complaint fails to allege any want of probable cause.

"6. Plaintiff's complaint fails to show malice on the part of the Defendant herein.

"7. Plaintiff admits by his complaint that the Municipal

Court of Chicago, Case #2859942 had jurisdiction of the subject matter and parties therein; that plaintiff herein was regularly served by summons; that this plaintiff filed his appearance in said original suit and that judgment was rendered against the present plaintiff, GEORGE LOVE, and in favor of defendant, GOLDENBERG FURNITURE COMPANY, in said original suit.

"8. That the subject matter of Plaintiff's Complaint herein was adjudicated by the judgment of the Municipal Court of Chicago in the case of GOLDENBERG FURNITURE COMPANY vs GEORGE LOVE #2859942.

"WHEREFORE defendant moves the court to dismiss the above entitled cause."

The sole question for us to determine is, whether or not the complaint alleges a good cause of action. In the short brief filed by appellant we find no effort made to show wherein the allegations of the complaint made out a prima facie case of false imprisonment or malicious prosecution. From the time of Blackstone to the present, to constitute the charge of false imprisonment there are two requisites, (1) the detention of the person, and (2) the unlawfulness of the detention. "Imprisonment under legal process of a court having jurisdiction of the subject matter cannot be made the basis of an action for false imprisonment." (Feld v. Loftis, 240 Ill. 105, 107.) In the instant case the complaint shows that plaintiff was arrested and confined upon a capias ad satisfaciendum regularly issued in a legal proceeding and upon a judgment entered in a cause wherein fraud was the gist of the action. It is clear that the detention of plaintiff was not unlawful, and, therefore, the complaint failed to make out a prima facie case of false imprisonment. It is equally clear that the complaint did not make out a prima facie case of malicious prosecution. In Schwartz v. Schwartz, 366 Ill. 247, 250, the court stated:

"An action for malicious prosecution is one for damages brought by a person against whom a criminal prosecution or a suit has been in-

Court of Illinois, Dean Aldrich has jurisdiction of the subject matter and parties thereto; that plaintiff herein has regularly served by summons; that this plaintiff filed his complaint in said original suit and that jurisdiction has vested against the defendant, GEORGE LOVE, and in favor of defendant, [illegible] FRANCISCO GONZALEZ, in said original suit.

"3. That the complete error of plaintiff's complaint herein was adjudicated by the judgment of the Municipal Court of Chicago in the case of [illegible] v. [illegible] [illegible].

"Wherefore defendant moves the court to dismiss the above entitled cause."

The sole question for us to determine is, whether or not the complaint alleges a good cause of action. In the above brief filed by appellant he fled no effort made to show wherein the allegations of the complaint made out a prima facie case of false imprisonment or malicious prosecution. From the time of Blackstone to the present, to constitute the charge of false imprisonment there are two requisites, (1) the detention of the person, and (2) the unlawfulness of the detention. "Imprisonment under legal process is a legal justification of the subject matter complained of, but it must appear that the process was sued out by a person authorized to issue the writ." (Dale v. Dorsey, 200 Ill. 267, 269.) In the instant case the complaint shows that plaintiff was arrested and confined upon a warrant of [illegible] regularly issued in a legal proceeding and upon a judgment entered in a court having jurisdiction of the subject matter. It is clear that the allegations of plaintiff are not material, and, therefore, the complaint failed to make out a prima facie case of false imprisonment. It is equally clear that the complaint did not make out a prima facie case of malicious prosecution. In Schwartz v. Sonnenfeld, 206 Ill. 347, 352, the court stated:

"An action for malicious prosecution lie on for damages brought by a person acquitted upon a criminal prosecution or a suit had been in-

stituted maliciously and without probable cause. This court has had occasion to say that the law does not look with favor upon such suits. One of the essentials of such a cause of action is that the prior litigation complained of shall have terminated in favor of the defendant therein."

"In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff." (25 C. J. 444, 445.)

Here we have a case where the allegations of the complaint show that the proceedings in the Municipal court did not terminate favorably to the instant plaintiff. Defendant assigns other reasons in support of its contention that the action of the trial court in sustaining the motion to dismiss was justified, but we do not deem it necessary to consider these other reasons.

We are satisfied that the trial court was justified in holding that the complaint did not make out a case of false imprisonment nor of malicious prosecution, and the judgment order of the Superior court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

initiated maliciously and without probable cause. This court has had occasion to say that the law does not look with favor upon such suits. One of the essentials of such a cause of action is that the prior litigation complained of shall have terminated in favor of the defendant therein."

"In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff." (18 R. C. L. 444, 453.)

Here we have a case where the allegations of the complaint show that the proceedings in the criminal court did not terminate favorably to the instant plaintiff. Defendant assigns other reasons in support of its contention that the action of the trial court in sustaining the motion to dismiss was justified, but we do not deem it necessary to consider these other reasons.

We are satisfied that the trial court was justified in holding that the complaint did not make out a case of false imprisonment nor of malicious prosecution, and the judgment order of the Superior court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

42296

THE GIRLS LATIN SCHOOL OF CHICAGO,
a corporation,

Appellee,

v.

L. EDWARD HART, JR., and BEATRICE B. HART,

Appeal of BEATRICE B. HART,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

139

317 I.A. 302

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal Court of Chicago, The Girls Latin School of Chicago sought to recover from L. Edward Hart, Jr., and Beatrice B. Hart the sum of $840.72 for schooling, luncheons and supplies furnished the two children of Beatrice B. Hart for the school year commencing in September, 1939 and ending in June, 1940. A trial before the court without a jury resulted in a finding and judgment in favor of L. Edward Hart, Jr., and against Beatrice B. Hart in the sum of $840.72. She appeals.

In 1936 a decree of divorce was entered in the Superior Court of Cook County severing the bonds of matrimony between Beatrice B. Hersey and Edward L. Hersey. The decree awarded the custody of the Hersey children, namely, Jeanette then aged seven, and Daphne then aged two years, to Beatrice B. Hersey. On September 4, 1936 Mrs. Hersey married Mr. L. Edward Hart, Jr. In the fall of 1936 Mrs. Hart entered Jeanette in The Girls Latin School of Chicago and the bills for her tuition for the 1936, 1937 and 1938 school years were sent by the school to Mr. Hersey, the father of the children, at his residence at Sarasota, Florida, a duplicate being sent to the defendant Beatrice B. Hart at the Hart home on Chestnut Street in Chicago. In the summer of 1939 Beatrice B. Hart filled out and transmitted to the plaintiff an application for

42298

THE GIRLS LATIN SCHOOL OF CHICAGO,
a corporation,

Appellee,

v.

L. EDWARD HART, Jr., and BEATRICE
B. HART,

Appellants.

Appeal of BEATRICE B. HART,

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

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In 1938 a decree of divorce was entered in the Superior Court of Cook County severing the bonds of matrimony between Beatrice B. Hersey and Edward L. Hersey. The decree awarded the custody of the Hersey children, namely, Jeanette then aged seven, and Daphne then aged two years, to Beatrice B. Hersey. On September 4, 1938 Mrs. Hersey married Mr. L. Edward Hart, Jr. In the fall of 1938 Mrs. Hart entered Jeanette in The Girls Latin School of Chicago and the bills for her tuition for the 1938, 1937 and 1938 school years were sent by the school to Mr. Hersey, the father of the children, at his residence at Sarasota, Florida, a duplicate being sent to the defendant Beatrice B. Hart at the Hart home on Chestnut Street in Chicago. In the summer of 1939 Beatrice B. Hart filled out and transmitted to the plaintiff an application for

the entry to school of her younger daughter Daphne, who was then old enough to go to school. Mr. Fulton, plaintiff's treasurer, communicated with defendant's husband, L. Edward Hart, Jr., and stated that Jeanette's tuition for the two preceding years had not been paid in full and that it would be impossible for Jeanette to return to school for the ensuing year, or for Daphne to enter the school with that account remaining open, solely upon the credit of Mr. Hersey. Elizabeth Singleton, plaintiff's head mistress, testified that Mr. Fulton had died; and that Mr. Hart told her in the fall of 1940 that he told decedent that he (Mr. Hart) would be responsible for the tuition of the children for that year, but wanted "some legal notice so that he could later collect from Mr. Hersey." L. Edward Hart, Jr. testified that he stated to Mr. Fulton that while he did not intend to guarantee the past due account and felt that it was Mr. Hersey's primary obligation to pay for the schooling of his children, he would guarantee the future account of the children if there was any question involved of their being able to re-enter the school. The conversation with Mr. Fulton occurred in September, 1939. Following this conversation, both children were permitted to attend the school for the 1939 school year. Tuition statements were sent by the school to both Mr. Hersey and Mr. Hart. It is conceded that the amount of $840.72 claimed to be due plaintiff for tuition, luncheons and supplies furnished to the two children of Beatrice B. Hart during the 1939-1940 school year, is reasonable and has never been paid.

On August 18, 1939, a few weeks before the school term commenced and about the time of the conversation between Mr. Fulton and Mr. Hart, Jr., a stipulation was entered into between Edward L. Hersey and Beatrice B. Hart and filed in the divorce case in the Superior Court of Cook County providing that all previous agreements regarding the support and maintenance of the two children were abrogated, and that Edward L. Hersey should henceforth pay to Beatrice B. Hart a sum equal

the entry to school of her younger daughter Daphne, who was then old enough to go to school. Mr. Fulton, plaintiff's treasurer, communicated with defendant's husband, E. Edward Hart, Jr., and stated that Jeanette's tuition for the two preceding years had not been paid in full and that it would be impossible for Jeanette to return to school for the ensuing year, or for Daphne to enter the school with that account remaining open, solely upon the credit of Mr. Hersey. Elizabeth Singleton, plaintiff's head mistress, testified that Mr. Fulton had died; and that Mr. Hart told her in the fall of 1940 that he told defendant that he (Mr. Hart) would be responsible for the tuition of the children for that year, but wanted "some legal notice so that he could later collect from Mr. Hersey." E. Edward Hart, Jr. testified that he stated to Mr. Fulton that while he did not intend to guarantee the past due account and felt that it was Mr. Hersey's primary obligation to pay for the schooling of his children, he would guarantee the future account of the children if there was any question involved of their being able to re-enter the school. The conversation with Mr. Fulton occurred in September, 1939. Following this conversation, both children were permitted to attend the school for the 1939 school year. Tuition statements were sent by the school to both Mr. Hersey and Mr. Hart. It is conceded that the amount of $840.72 claimed to be due plaintiff for tuition, luncheons and supplies furnished to the two children of Beatrice H. Hart during the 1939-1940 school year, is reasonable and has never been paid.

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to 25% of his monthly income, payable on the first day of each month beginning July 1, 1939, as and for the support and maintenance of the children, provided that if, as and when 25% of the income of Edward L. Hersey exceeds the sum of $250 per month, Hersey shall thenceforth pay to Beatrice B. Hart the sum of $250 per month as and for the support and maintenance of the children. There is no evidence to show whether or not Beatrice B. Hart received anything from Edward L. Hersey for the support and maintenance of the children pursuant to the agreement of August 18, 1939. L. Edward Hart Jr. contended in the trial that he had not agreed to pay the account as the principal debtor, but only in the event plaintiff was unable to collect from Mr. Hersey, and that no recovery could be had against him in the absence of proof that plaintiff had made an unsuccessful effort to collect from Mr. Hersey. It appears that Mr. Hersey had written plaintiff's attorneys denying liability for the account on the ground that an order entered in the divorce proceeding pursuant to the stipulation discharged him from any personal liability to the plaintiff for the subsequent schooling of the children.

Beatrice B. Hart asserts that she did not contract with the plaintiff for the schooling, luncheons and supplies furnished by the plaintiff. Plaintiff insists that she is liable for the tuition, luncheons and supplies furnished to her minor daughters. The record shows that Beatrice B. Hart placed the children in the school for the 1939-1940 school year. At common law the status of a mother was such that she was not under legal obligation to support her minor children where the father was alive and able to do so, but since her emancipation by statute she has become possessed of the full enjoyment of her earnings and property and is legally responsible for the support, maintenance and schooling of her minor children equally with her husband. Purity Baking Company v. The Industrial Commission, 334 Ill. 586; Hoover v. Hoover, 307 Ill. App. 590, 603. Defendant concedes that a mother is under a duty to support her minor children, but argues that she is not

to 25% of his monthly income, payable on the first day of each month beginning July 1, 1939, as and for the support and maintenance of the children, provided that if, as and when 25% of the income of Edward L. Hersey exceeds the sum of $250 per month, Hersey shall thereafterth pay to Beatrice B. Hart the sum of $250 per month as and for the support and maintenance of the children. There is no evidence to show whether or not Beatrice B. Hart received anything from Edward L. Hersey for the support and maintenance of the children pursuant to the agreement of August 18, 1939. L. Edward Hart Jr. contended in the trial that he had not agreed to pay the account as the principal debtor, but only in the event plaintiff was unable to collect from Mr. Hersey, and that no recovery could be had against him in the absence of proof that plaintiff had made an unsuccessful effort to collect from Mr. Hersey. It appears that Mr. Hersey had written plaintiff's attorneys denying liability for the account on the ground that an order entered in the divorce proceeding pursuant to the stipulation discharged him from any personal liability to the plaintiff for the subsequent schooling of the children.

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liable for a contract which some stranger makes for the education of her children. The evidence shows that Jeanette was entered in the school by the defendant in September, 1936, after she had remarried. In the summer of 1939 Beatrice B. Hart made application for the admission of her daughter Daphne to the school. This application was forwarded from the country home of Mr. and Mrs. Hart at Harbor Springs, Michigan. There is competent evidence in the record to show that Beatrice B. Hart undertood the responsibility of seeing to the education of her children. The fact that the father of the children is also liable to the plaintiff for the tuition, luncheons and supplies furnished to his children, does not in any way relieve the mother of her obligation. In our opinion, substantial justice has been done in this case by the entry of a judgment against Beatrice B. Hart.

Defendant also urges that she "is not liable under the family expense statute for the necessaries supplied for her daughters under a contract between plaintiff and defendant's former husband since these necessaries were furnished after she had been divorced from her former husband and the family relation had ceased to exist." As we have disposed of the case on another point, it is unnecessary to consider this contention. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL and KILEY, JJ, CONCUR.

liable for a contract which some stranger makes for the education of her children. The evidence shows that Jeanette was entered in the school by the defendant in September, 1938, after she had remarried. In the summer of 1939 Beatrice B. Hart made application for the admission of her daughter Daphne to the school. This application was forwarded from the country home of Mr. and Mrs. Hart at Harbor Springs, Michigan. There is competent evidence in the record to show that Beatrice B. Hart understood the responsibility of assing to the education of her children. The fact that the father of the children is also liable to the plaintiff for the tuition, luncheons and supplies furnished to his children, does not in any way relieve the mother of her obligation. In our opinion, substantial justice has been done in this case by the entry of a judgment against Beatrice B. Hart.

Defendant also urges that she "is not liable under the family expense statute for the necessaries supplied for her daughters under a contract between plaintiff and defendant's former husband since these necessaries were furnished after she had been divorced from her former husband and the family relation had ceased to exist." As we have disposed of the case on another point, it is unnecessary to consider this contention. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL and KILEY, JJ., CONCUR.

41996

KALLIOPE SARELAS,

Appellant,

vs.

SAMUEL MEYER and THE HOOVER COMPANY, a corporation,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

old opinion not needed in separate point from rehearing opinion! only - per J.W. Johnson 1-27-43

317 I.A. 332

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT ON REHEARING.

In passing upon a rehearing that was allowed by the court to the plaintiff in the above entitled cause, and to which the defendants filed an answer, we will consider the questions as they were presented by the parties. The question that is involved in this rehearing is whether the plaintiff erred in not setting out the instructions in full in the briefs that were filed with this court and upon their consideration specifically referring to the instructions which were set out in full in the Abstract, Record and the Reply Brief.

In considering this question as it came before this court we reached the conclusion that in not setting out the instructions in full in the brief the plaintiff did not comply with the rule as it was established by this court, that it was necessary, in order that consideration might be given to the questions involved in the instructions, to set out the several instructions in full. Plaintiff not having done so, this court applied the rule as it was established in the cases of Cory v. Woodmen Accident Co., 253 Ill. App. 20; Sterling Midland Coal Company v. Ready & Callaghan Coal Company, 236 Ill. App. 403; Wasilevitsky v. City of Chicago, 280 Ill. App. 531; and Zorger v. Hillman's, 287 Ill. App. 357. And in considering the question we were impressed with the opinion of this court in the case entitled Spencer v. Chicago and North Western Ry. Co.,

41955

KALLIOPE SALMAS,

Appellant,

vs.

SAMUEL MEYER and THE NOVEMA COMPANY, a corporation,

Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

HON. JUSTICE MEANS DELIVERED THE OPINION OF THE COURT OF REHEARING.

In passing upon a rehearing that was allowed by the court to the plaintiff in the above entitled cause, and to which the defendants filed an answer, we will consider the questions as they were presented by the parties. The question that is involved in this rehearing is whether the plaintiff erred in not setting out the instructions in full in the briefs that were filed with this court and upon their consideration specifically referring to the instructions which were set out in full in the abstract, Record and the Reply Brief.

In considering this question as it came before this court we reached the conclusion that in not setting out the instructions in full in the brief the plaintiff did not comply with the rule as it was established by this court, that it was necessary, in order that consideration might be given to the questions involved in the instructions, to set out the several instructions in full. Plaintiff not having done so, this court applied the rule as it was established in the cases of Cory v. Goodman Accident Co., 252 Ill. App. 20; Peterline Midland Coal Company v. Healy & Gallagher Coal Company, 236 Ill. App. 402; Kwiatkowsky v. City of Chicago, 250 Ill. App. 322; and Zorrer v. Hillman's, 287 Ill. App. 287. And in considering the question we were impressed with the opinion of this court in the case entitled Spencer v. Chicago and North Western Ry. Co.,

249 Ill. App. 463, where the opinion of the court was delivered by Mr. Justice Wilson, speaking for the Third Division, who said:

"Counsel for defendant raises several objections to certain instructions given on behalf of the plaintiff. While these objections were argued at length in the brief, they are not set out in full but referred to by number. This court should not be required to search for such matters but they should be contained in the argument. General Platers Supply Co. v. L'Hommedieu & Sons Co., 228 Ill. App. 201. It is attempted to cure this, however, by restating the instructions in full, together with the arguments thereon in the reply brief filed herein, but this does not cure the objection. We have examined the instructions, however, and do not find that there is error sufficient to cause a reversal of the case."

Subsequently the question was before this court in the case of Jones v. Keilbach, 309 Ill. App. 233, and upon a like question this court said:

"We have considered all of the objections of the defendant to instructions which were given on behalf of plaintiff and as to two instructions which were refused upon being tendered by the defendant, and have concluded that there was no reversible error in the giving or refusal of such instructions. We believe, however, that this case furnishes an appropriate opportunity to restate a ruling which has long been established in our Appellate Courts, and which should be adhered to by litigants in the presentation of objections with reference to instructions in this court. As was stated by the court in Cory v. Woodmen Accident Co., 253 Ill. App. 20, at page 35, 'Complaint is also made that there was error in the giving of some of the instructions for the appellee, and in modifying some of the instructions given for the appellant, but the instructions are not set out in the brief and argument, but merely referred to by designated numbers. The questions involved are therefore not properly before us for consideration.' (General Platers Supply Co. v. Charles F. L'Hommedieu & Sons Co., 228 Ill. App. 201; Sterling-Midland Coal Co. v. Ready & Callaghan Coal Co., 236 Ill. App. 403.) In the instant case none of the instructions as to which objections are raised by appellant are set forth in the brief and argument, but all of such instructions are simply referred to by number. This court will not, therefore, give detailed consideration to such objections in this opinion."

The fact, however, is that the plaintiff in this action in the petition for the rehearing does not follow the rule in her argument, but states that "it will be noted that the defendants' instruction number 2 is a peremptory instruction as set forth in haec verba on page 45 of appellee's brief; also, plaintiff's instruction number 2 is set forth on page 44 of appellee's brief;

249 Ill. App. 463, where the opinion of the court was delivered by Mr. Justice Wilson, speaking for the First Division, who said:

"Counsel for defendant raises several objections to certain instructions given on behalf of the plaintiff. While these objections were argued at length in the brief, they are not set out in full nor referred to by number. This court should not be required to search for such matters but they should be contained in the argument. General Platers Supply Co. v. L'Commodien & Sons Co., 258 Ill. App. 201. It is attempted to cure this, however, by restating the instructions in full, together with the arguments thereon in the reply brief filed herein, but this does not cure the objection. We have examined the instructions, however, and do not find that there is error sufficient to cause a reversal of the case."

Subsequently the question was before this court in the case of Jones v. Kellogg, 309 Ill. App. 388, and upon a like question this court said:

"We have considered all of the objections of the defendant to instructions which were given on behalf of plaintiff and as to two instructions which were refused upon tendered by the defendant, and have concluded that there was no reversible error in the giving or refusal of such instructions. We believe, however, that this case furnishes an appropriate opportunity to restate a ruling which has long been established in our appellate courts, and which should be adhered to by litigants in the presentation of objections with reference to instructions in this court. As was stated by the court in Dorr v. Hoffner Contract Co., 308 Ill. App. 20, at page 22, 'Complaint is also made that there was error in the giving of some of the instructions for the appellee, and in refusing some of the instructions given for the appellant, but the instructions are not set out in the brief and argument, but merely referred to by designated numbers. The questions involved are therefore not properly before us for consideration.' (General Platers Supply Co. v. Charles E. L'Commodien & Sons Co., 258 Ill. App. 201; Sterling-Midland Coal Co. v. Ill. & Midland Coal Co., 256 Ill. App. 403.) In the instant case none of the instructions as to which objections are raised by appellant are set forth in the brief and argument, but all of such instructions are simply referred to by number. This court will not, therefore, give detailed consideration to such objections in this opinion."

The fact, however, is that the plaintiff in this action in the petition for the rehearing does not follow the rule in her argument, but states that "it will be noted that the defendants' instruction number 2 is a peremptory instruction as set forth in our verbs on page 44 of appellee's brief; also, plaintiff's instruction number 1 is set forth on page 44 of appellee's brief;

defendants' instruction number 3 is fully set out on page 48 of appellee's brief; and defendants' instruction number 5 is fully set out on page 49 of appellee's brief; defendants' instruction number 7 is fully set out on page 51 of appellee's brief; defendants' instruction number 8 is also fully set out on page 52 of appellee's kr brief; defendants' instruction 16 is fully set out on pages 53 and 54 of appellee's brief. So we have all of the instructions fully set out in the Record, in the Abstract, referred to by number and Abstract and Record pages pointed out in the Brief with the error incident thereto, and seven of them fully and completely set out in the brief of defendants-appellees, in which brief the other instructions are discussed and described and then again the instructions are set forth beginning on page 10 of the reply brief of plaintiff-appellant."

The argument that is offered is not in line with what has been suggested by the Appellate Court. The instructions shall be fully set out together with the objections that are offered, that the court may consider them and pass upon the questions that are involved. It is to be regretted that the plaintiff has failed to comply with the rule that we have called attention to.

Again in the petition for rehearing the plaintiff uses this language: "In the instant case counsel for plaintiff-appellant, specifically criticized the instructions in the brief on pages 25-28, 30-38, 39-45, set them out in full in the reply brief on pages 10-24, in numerical and chronological order, and specifically referred to the instructions set out in full in the abstract and the record (Abst. 39-59; Rec. 394-418), by giving the page number to the abstract and record for each instruction set out in numerical and chronological order."

defendants' instruction number 3 is fully set out on page 48 of appellee's brief; and defendants' instruction number 5 is fully set out on page 49 of appellee's brief; defendants' instruction number 7 is fully set out on page 51 of appellee's brief; defendants' instruction number 8 is also fully set out on page 52 of appellee's brief; defendants' instruction 18 is fully set out on pages 53 and 54 of appellee's brief. So we have all of the instructions fully set out in the Record, in the Abstract, referred to by number and Abstract and Record pages pointed out in the brief with the error incident thereto, and seven of them fully and completely set out in the brief of defendants-appellees, in which brief the other instructions are discussed and described and then again the instructions are set forth beginning on page 10 of the reply brief of plaintiff-appellant."

The argument that is offered is not in line with what has been suggested by the Appellate Court. The instructions shall be fully set out together with the objections that are offered, that the court may consider them and pass upon the questions that are involved. It is to be regretted that the plaintiff has failed to comply with the rule that we have called attention to.

Again in the petition for rehearing the plaintiff uses this language: "In the instant case counsel for plaintiff-appellant, specifically criticized the instructions in the brief on pages 25-28, 30-38, 39-45, set them out in full in the reply brief on pages 10-24, in numerical and chronological order, and specifically referred to the instructions set out in full in the abstract and the record (Abst. 39-89; Rec. 394-419), by giving the page number to the abstract and record for each instruction set out in numerical and chronological order."

So that when we come to consider them the court is obliged to follow the suggestions that were offered in the brief of the plaintiff and examine the record as well as the abstract and the reply brief to determine whether the questions were properly before this court.

We, however, have reached the conclusion under the argument, such as was offered, to consider the instructions for the purpose of determining whether there was error sufficient to justify the reversal of this case, and in the examination of these so-called errors that are called to our attention we find that the plaintiff complains about several of the instructions that were refused by the court, and in order that they may be properly before the court we have had the instructions that we have in mind copied, and they are as follows:

"(3) You are instructed that at the time of the happening of the accident in question, there was in full force and effect a certain ordinance of the City of Chicago known as Section 52(b)2 of the Uniform Traffic Code for the City of Chicago which was in words and figures as follows:

'(b) The operator of a vehicle, in overtaking and passing another vehicle, or at any other time, shall not drive to the left side of the roadway under the following conditions:

'2. When approaching within 100 feet of any bridge, viaduct, or tunnel, or when approaching within 100 feet of or traversing any intersection or railroad grade crossing.'"

"(4) You are instructed that at the time of the happening of the accident in question, there was in full force and effect a certain ordinance of the City of Chicago known as Section 16 of the Uniform Traffic Code for the City of Chicago which was in words and figures, as follows:

'(Pedestrians' Rights and Duties at Controlled Intersections.) At intersections where traffic is controlled by official traffic signals or by police officers, operators of vehicles shall yield the right of way to pedestrians crossing or those who have started to cross the roadway on a green or "Go" signal, and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green or "Go" signal.'"

So that upon we come to consider then the court is obliged to follow the suggestions that were offered in the brief of the plaintiff and examine the record as well as the abstract and the reply brief to determine whether the questions were properly before this court.

We, however, have reached the conclusion under the argument, such as was offered, to consider the instructions for the purpose of determining whether there was error sufficient to justify the reversal of this case, and in the examination of these so-called errors that are called to our attention we find that the plaintiff complains about several of the instructions that were refused by the court, and in order that they may be properly before the court we have had the instructions that we have in mind copied, and they are as follows:

"(3) You are instructed that at the time of the happening of the accident in question, there was in full force and effect a certain ordinance of the City of Chicago known as section 22(b)2 of the Uniform Traffic Code for the City of Chicago which was in words and figures as follows:

'(b) The operator of a vehicle, in overtaking and passing another vehicle, or at any other time, shall not drive to the left side of the roadway under the following conditions:

'2. When approaching within 100 feet of any bridge, viaduct, or tunnel, or when approaching within 100 feet of or traversing any intersection or railroad grade crossing.'"

"(4) You are instructed that at the time of the happening of the accident in question, there was in full force and effect a certain ordinance of the City of Chicago known as section 18 of the Uniform Traffic Code for the City of Chicago which was in words and figures, as follows:

'(Pedestrians' Rights and Duties at Controlled Intersections.) At intersections where traffic is controlled by official traffic signals or by police officers, operators of vehicles shall yield the right of way to pedestrians crossing or those who have started to cross the roadway on a green or "Go" signal, and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green or "Go" signal.'"

"(5) You are instructed that at the time of the accident in question there was in full force and effect a certain statute of the State of Illinois, known as Section 49 of the Uniform Act Regulating Traffic on the Highway, which was in words and figures as follows:

'No person shall drive a vehicle of the first division as described in Article I of this Act, upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle of said first division, operated upon any public highway in this State where the same passes through the business district of any city, village or incorporated town exceed twenty (20) miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this State where the same passes through the residence district of any city, village or incorporated town exceeds twenty-five (25) miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this State in a suburban district, exceeds thirty-five (35) miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person.'"

"(6) You are instructed that at the time of the accident in question, there was in full force and effect a certain ordinance of the City of Chicago, known as Section 53 of the Uniform Traffic Code for the City of Chicago, which was in words and figures as follows:

'It shall be unlawful to operate any motor vehicle upon any street or public way of this city at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle operated upon any public street or highway in this city where the same passes through a Business District exceeds 20 miles an hour, or if the rate of speed of any motor vehicle operated on any public street or highway in the city where the same passes through a Residential District exceeds 25 miles an hour, or if the rate of speed of any such motor vehicle operated on any public street or highway in this city in a Sparsely Settled District exceeds 35 miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person.'"

"(7) You are instructed that at the time of the accident in question there was in full force and effect a certain Statute of the State of Illinois, known as Section 58(b)2 of the Uniform Act Regulating Traffic on the Highways, which was in words and figures as follows:

'No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

"(5) You are instructed that at the time of the accident in question there was in full force and effect a certain statute of the State of Illinois, known as Section 60 of the Uniform Regulating Traffic on the Highway, which was in words and figures as follows:

'No person shall drive a vehicle at the time of the accident in question there was in full force and effect a certain statute of the State of Illinois, known as Section 58(b)2 of the Uniform Act Regulating Traffic on the Highway, which was in words and figures as follows:

'No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven in the left side of the roadway under the following conditions:

"(5) You are instructed that at the time of the accident in question there was in full force and effect a certain statute of the State of Illinois, known as Section 60 of the Uniform Traffic Code for the City of Chicago, which was in words and figures as follows:

'It shall be unlawful to operate any motor vehicle upon any street or public way of this city at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle operated upon any public street or highway in the city where the same passes through a residential district exceeds 20 miles an hour, or if the rate of speed of any motor vehicle operated on any public street or highway in the city where the same passes through a residential District exceeds 20 miles an hour, or if the rate of speed of any such motor vehicle operated on any public street or highway in this city in a generally zoned District exceeds 30 miles an hour, such rate of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person.'"

"(7) You are instructed that at the time of the accident in question there was in full force and effect a certain statute of the State of Illinois, known as Section 58(b)2 of the Uniform Act Regulating Traffic on the Highway, which was in words and figures as follows:

'No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven in the left side of the roadway under the following conditions:

'When approaching within 100 feet of any bridge, viaduct, or tunnel or when approaching within 100 feet of or traversing any intersection or railroad grade crossing.'"

The giving of instructions solely in the language of a statute or ordinance as was attempted here amounts merely to the statement of an abstract legal proposition, and this court has frowned upon the giving of such instructions.

In Burke v. Zwick, 299 Ill. App. 558, the court said:

"The instruction is an abstract legal proposition. The practice of giving such has been repeatedly disapproved by the courts of this State because of the tendency of such charge, not made applicable to the evidence, to mislead the jury; Mayer v. Springer, 192 Ill. 270; Smith v. Illinois Power Co., 279 Ill. App. 505. As said in Mayer v. Springer, supra: 'It is the duty of the court to give to the jury, in its instructions, rules of law which are applicable to the evidence in the case, and to make the application so that the jury may understand the relation of the rules to the evidence.'"

And at page 562 of the opinion the court said:

"Plaintiff's given instruction No. 8 was a copy of a part of a statutory section of the Motor Vehicles Act, and was as follows: 'You are instructed that the statutes of this State provide as follows: "Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding a horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon any roadway."' This is an abstract legal proposition, not by its terms made applicable to the facts, and as such is liable to confuse the jury; Williams v. Stearns, supra; City of Chicago v. Sutton, 136 Ill. App. 221. We think it should have been refused."

And it further appears from the authorities that instructions in the language of the speed statutes have been criticized frequently as tending to mislead a jury. Scally v. Flannery, 292 Ill. App. 349; Barnhart v. Goin, 266 Ill. App. 591; Stamas v. Waskow, 250 Ill.App.364; Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392; Stansfield v. v. Wood, 231 Ill. App. 586. And it was suggested that the language of these various instructions tended to mislead the jury. The speed statutes and the ordinances use the term "prima facie," and the giving of such instructions with these words has been criticized by the Supreme Court.

'When approaching within 100 feet of any bridge, viaduct, or tunnel or when approaching within 100 feet of or traversing any intersection or railroad track crossing.'

The giving of instructions solely in the language of a statute or ordinance as was attempted here amounts merely to the statement of an abstract legal proposition, and this court has frowned upon the giving of such instructions.

In Burke v. Zwick, 229 Ill. App. 520, the court said:

"The instruction is an abstract legal proposition. The practice of giving such has been repeatedly disapproved by the courts of this State because of the tendency of such course, not made applicable to the evidence, to mislead the jury; Mayer v. Spurmier, 182 Ill. 272; Smith v. Illinois Central R., 279 Ill. 498. As said in Mayer v. Spurmier, supra: 'It is the duty of the court to give to the jury, in its instructions, rules of law which are applicable to the evidence in the case, and to make the application so that the jury may understand the relation of the rules to the evidence.'"

And at page 522 of the opinion the court said:

"Plaintiff's given instruction no. 8 was a copy of a part of a statutory section of the Motor Vehicle Act, and was as follows: 'You are instructed that the statutes of this State provide as follows: "Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding a horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon any roadway."' This is an abstract legal proposition, not by its terms made applicable to the facts, and as such is liable to confuse the jury; Williams v. Stearns, supra; City of Chicago v. Sutton, 186 Ill. 544. We think it should have been refused."

And it further appears from the authorities that instructions in the language of the speed statutes have been criticized frequently as tending to mislead a jury. Scally v. Flannery, 292 Ill. App. 369; Barnhart v. Cohn, 286 Ill. App. 391; Jones v. Tabbs, 290 Ill. App. 464; Herrie v. Pinsly Mfg. Stores, Inc., 286 Ill. App. 492; Schwartzell v. Moon, 291 Ill. App. 386. And it was suggested that the language of these various instructions tended to mislead the jury. The speed statutes and the ordinances use the term "prima facie," and the giving of such instructions with these words has been criticized by the Supreme Court.

In People v. McCurrie, 337 Ill. 290, the court in its opinion said:

"This court has repeatedly condemned the practice of giving instructions containing the words 'prima facie' as an abstract term. (People v. Sikes, 328 Ill. 64; Grosh v. Acom, 325 id. 474; Johnson v. Pendergast, 308 id. 255; People v. Tate, 316 id. 52."

So that when we come to consider these instructions that we have copied in this opinion they are subject to the opinions that we have quoted, and of course such instructions state abstract legal propositions, and the jury are not advised of the application of the instructions to the evidence, and for the reasons that we have stated we believe that the court did not err in denying the giving of these instructions for the plaintiff.

As to the other instructions, we have examined them carefully and are of the opinion that the instructions as they appear in this record were justified by the facts as they appeared in the case.

There are certain other questions that have been raised upon the evidence as it was presented to the jury, but we are of the opinion that the evidence so permitted to go to the jury was justified by the facts as well as the application of the law that controls, and we adhere to what was said in our opinion on this question.

Having considered the questions that were before us, we are of the opinion that the court's judgment was a proper one. The judgment is therefore affirmed.

AFFIRMED.

BURKE, P.J., AND KILEY, J., CONCUR.

In *People* v. *McCurtis*, 327 Ill. 270, the court in its opinion said:

"This court has repeatedly condemned the practice of giving instructions constituting the verdict 'prima facie' or so strong. term. (*People* v. *Ochs*, 295 Ill. 34; *Wright* v. *Ill.*, 188 Ill. 67; *Johnson* v. *Kansas City*, 108 Ill. 290; *Lyman* v. *Ill.*, 103 Ill. 6.)

So that when we come to consider these instructions that we have before us this opinion that are analyzed at the minutes that we have quoted, and of a case such instructions state conflicting legal propositions, and the jury are not aided or the qualification of the instructions to the evidence, and for the reasons that we have stated we believe that the court did not err in refusing the giving of these instructions for the defendant.

As to the other instructions, we have examined them carefully and are of the opinion that the instructions as they appear in this record were justified by the facts as they appeared in the case.

There are certain other questions that have been raised upon the evidence as it was presented to the jury, but we are of the opinion that the evidence is sufficient to go to the jury was justified by the facts as well as the qualification of the law that controls, and we adhere to what we said in our opinion on this question.

Having considered the questions that were before us, we are of the opinion that the court's judgment was a proper one. The judgment is therefore affirmed.

AFFIRMED.

ELETT, J.J., AND FILLEY, J., CONCUR.

41996

KALLIOPE SARELAS, Plaintiff - Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
SAMUEL MEYER and THE HOOVER COMPANY, a corporation, Defendants - Appellees.	)	COOK COUNTY.

31 I.A.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered January 16, 1941, on the verdict of the jury, and from the order of the court overruling and denying plaintiff's motions for judgment notwithstanding the verdict and for a new trial.

The facts appearing in plaintiff's statement are that plaintiff, a married woman, was crossing Central Avenue, from the southeast corner, at the intersection of Diversey Boulevard and Central Avenue on the south cross walk of Diversey Boulevard; that while crossing, she was struck by an automobile driven by defendant Samuel Meyer, a salesman and employee of defendant, The Hoover Company; that defendant Meyer was engaged at the time in bringing Hoover vacuum cleaning machines to a lady with whom he had made an appointment, for the purpose of selling the same; that there were "stop" and "go" lights flashing "red" and "green"; that the plaintiff had the "green" light, started to cross, and while she was crossing, the lights turned "yellow" and "red"; that defendant Meyer drove through the lights, running down the plaintiff, who was at the crosswalk, and stopping his car in the middle of Diversey Boulevard. The car was facing northwest when it came to a stop. Plaintiff suffered a broken clavicle and had uterus trouble as a result of the accident. It was further shown that the defendant, The Hoover Company had taken out Workmen's Compensation Insurance and Liability Insurance on its

salesmen, including defendant Meyer; that the company provided demonstration tables at various stores in Chicago under an arrangement with the stores where the contracts were made, lists of contacts given, and defendant Meyer was on his way to sell Hoover machines in furtherance of the business of the defendant, The Hoover Company, to a prospect obtained from one of these stores at the time of the accident. Plaintiff contends that the automobile was driven at a high rate of speed, that no warning of the approach of the vehicle was given by sounding the horn or otherwise, and that the speed of the automobile was not slackened on the approach to the highway and that defendant wantonly drove his car across the crosswalk, without regard to the passengers of the street car bus of which plaintiff had been one; and that all of said actions were in violation of the Statutes of Illinois, and the ordinances of the City of Chicago.

To plaintiff's statement of facts, the defendants add that in the early afternoon of December 6, 1938, plaintiff boarded a northbound Central Avenue street car feeder bus to go to Diversey Avenue where she intended transferring to an eastbound bus on the latter street in order to go to Logan Square. After riding north, the bus arrived at Diversey, stopping at the southeast corner with the front end of the bus approximately even with the east and west cross-walk. There was an eastbound bus at the southwest corner. Plaintiff alighted from the bus; she was not the first one off. She went around the front corner of the bus to cross Central Avenue in order to take the eastbound bus. The defendant Meyer, who had been driving his automobile north on Central and who, when he approached the intersection at Diversey, had stopped behind two other cars because the lights had turned red, started forward when the lights turned green and the other cars had gone ahead. He had been waiting behind the two cars possibly half a minute or a minute before the lights changed to green. He traveled from the point at which he had stopped to the front of the bus - a distance of

ndanum, including defendant Meyer; that the counsel involved transportation tables or rates stored in Chicago under an arrangement with the stores where the commodities were sold, likely or possible given, and defendant Meyer was on his way to sell these commodities in furtherance of the business of the defendant, the Joint Venture, to a prospect obtained from one of these stores at the time of the accident. Plaintiff contends that Mr. Schmidt was driving at a high rate of speed, that no warning of the approach of the vehicle was given by sounding the horn or otherwise, and that the speed of the automobile was not slackened on the approach to the intersection that defendant negligently drove his car across the crosswalk, without regard to the pedestrians of the street and has of which plaintiff had been one; and that it all of said actions were in violation of the laws of Illinois, and the ordinances of the City of Chicago.

To plaintiff's statement of facts, the defendants add that in the early afternoon of December 6, 1956, plaintiff boarded a southbound Central Avenue street car Packer but to go to Irving Park where the intended transferring to an eastbound bus on the latter street in order to go to Logan Square. After riding north, the bus arrived at Irving, stopping at the southwest corner with the front end of the bus approximately even with the east and west crosswalk. There the bus discharged bus at the southwest corner. Plaintiff alighted from the bus; she was not the first one off. She went around the front corner of the bus to cross Central Avenue in order to board the eastbound bus. The defendant Meyer, who had been driving his automobile north on Central and who, when he approached the intersection at Irving, had stopped behind two other cars because the lights had turned red, started forward when the lights turned green and the other cars had gone ahead. He had been waiting behind the two cars peacefully half a minute or a minute before the lights changed to green. He traveled from the point at which he had stopped to the front of the bus - a distance of

fifteen or eighteen feet. When he came abreast of the bus at the southeast corner, he saw the plaintiff coming obliquely across the street. She was not exactly running but walking at a very fast walk. She was looking north with her head down. When he first saw her he was almost upon her. He was abreast of the bus and about four feet west of it. She was about two feet west of the bus and six feet north of the front of his car. She was in the cross-walk which was about seven or eight feet south of the Diversey curb line, but she left it and was going in a northwesterly direction. Defendant was going about ten miles an hour. He immediately swerved his car toward the center of the street to avoid coming in contact with her. He had no time to apply his brakes as his object was to avoid coming in contact with her. When his front wheels crossed into the southbound lane he had to slow up because of oncoming traffic from the north. At that moment he heard a thump and he immediately applied his brakes and stopped. He had gone about ten feet when he heard the thump, which was caused by plaintiff coming in contact with defendant Meyer's car at the right front fender and doors which caused her to fall. It was not the front end of the car, not the front bumper with which she came in contact. The car stopped at a slight angle to the northwest and between the cross-walk and the Diversey center line. The plaintiff was in the street between four and eight feet south and to the east of the car, i. e., the right rear of the car. She was about eight feet from the east curb on Central avenue.

The witness Lapp, a supervisor for the street car company, stationed at the southwest corner of the intersection of Diversey and Central Avenue, was standing facing east at the time of the accident. He was the only witness to the accident besides the defendant Meyer. He saw plaintiff come around the front of the bus and start to cross over in a hurry. He saw that she was stepping into traffic, the

ritten or eighteen feet. When he first observed it the car at the northeast corner, he saw the plaintiff coming obliquely across the street. She was not exactly running but walking at a very fast rate. She was looking north with her head down. When he first saw her he was almost upon her. He did observe of the car and about four feet west of it. She was struck the fast west of the bus and six feet north of the front of plaintiff. The car in the cross-walk was about seven or eight feet south of the twenty foot line, but she left it and was going in a northwesterly direction. Defendant was going about ten miles an hour. He immediately covered his car behind the center of the street to avoid coming in contact with her. He had no time to apply his brakes or his object was to avoid coming in contact with her. When his front wheel crossed into the northbound lane he had to slow up because of approaching traffic from the north. At that moment he heard a thump or scraping indicating his car had struck and stopped. He had gone about ten feet when he heard the thump. Motion was caused by plaintiff coming in contact with defendant's car at the right front fender and cause which caused her to fall. It was not the front end of the car, but the front fender with which was came in contact. The car travel at a right angle in the northbound lane between the cross-walk and the twenty foot line. The plaintiff was in the street between four and eight feet south and to the west of the car, i. e., the right rear of the car. She was about eight feet from the east curb on central avenue.

The witness Lucy, a waitress for the street car company, stationed at the southwest corner of the intersection of Jersey and Central Avenue, was standing facing east at the time of the accident. He was the only witness to the accident besides the defendant driver. The plaintiff came around the front of the bus and stepped to cross in a hurry. He saw that she was running into traffic. She

traffic lights being green for north and south traffic, and the east and west traffic on Diversey not moving. He took a step forward and hollered "Watch out". Plaintiff evidently did not hear him because she kept on going across the street looking west toward the waiting eastbound bus. She kept looking forward, and her movement was continuous from the first time he saw her (coming around the front of the bus) up until the time of the accident. Her line of movement in reference to the eastbound bus was slightly to the north. The point of contact was on the north half of the south cross-walk on Diversey, and just as she had passed the standing bus. This witness testified that as the northbound bus came up to the corner, the lights on Central changed from red to green; that the light changed from red to green before the plaintiff crossed in front of the bus - the lights were changing as she started across.

After the accident, the plaintiff was taken to a hospital by defendant Meyer in his car, where he reported to the police officers who came to the hospital. They tested his brakes, said they were all right and told him to go on his way. He secured the names of two witnesses - oblacki and Gabel, who appeared and testified.

There is a conflict as to which traffic had the lights in its favor at the time of the accident, plaintiff claiming that they were green for east and west traffic, but it would appear that the preponderance was rather with the defendant. Defendants suggest that there were only two witnesses to the actual occurrence, Lapp and the defendant Meyer, and that both testified that the lights were green for north and south traffic at the time of the accident. The plaintiff testified that she looked west toward the traffic lights on the southwest corner before she started across and that they were green - that the time when she was struck was just about when they were turning. She also testified that she looked north as she walked west, and that she did not see defendant's car before she came in contact with it.

traffic lights being given for both the N. and S. traffic, and the lady and her husband in between are driving. "It was a few seconds and believed "Green one". Plaintiff maintained he had only in reasons the car to pass around the traffic lights that lasted the waiting anything but. The last lights Trooper, his car attorney was continued from the first time on his car lights around the front of the bus; in order the view of the accident. The view of witnesses in relation to the testimony the well-lighted to the lights. The point of contact was in the other half of the road, somewhat on driveway, and just in the bus leaving the standing bus. This witness testified that in the exchanging bus was up to the street, the lights on Central changed two and to green; that the light changed from red to green before the plaintiff crossed in front of the bus - the lights were changing on the street where.

After the accident, the plaintiff was taken to a hospital by defendant driver in his car, where he reported to the police officers who came to the hospital. They stated his version, but they were all right and told him to go on his way. He reported the names of the witnesses - Colonel and Grant, who appeared and testified.

There is a conflict as to which traffic the lights in the front or the view of the accident, plaintiff claiming that they were green for his side and that it would appear that the correspondence was rather with the defendant. Defendant claims that there were only two witnesses of the actual occurrence, Grant and the defendant driver, and that both testified that the lights were green for traffic and which traffic is the view of the accident. The plaintiff testified that she looked very behind the traffic light in the southwest corner before the street corner at that time they were green - that the bus came all the through the first time when they were leaving. The line testified that the signal light of the street was, and that she did not see defendant's car before the same in contact with it.

Schalli, a witness for the plaintiff, was the driver of the bus. He stated that the light was red for north and south traffic when he stopped his bus; that some people got off and some on, and that between then and the time of the accident the light might have changed, but that he did not see the accident. He just saw her walk to the west around the corner of the bus. The bus was about ten feet wide and was about a foot from the east curb.

The witnesses Poblacki and Gabel were riding east on Diversey in a car driven by Gabel. Neither one saw the accident. Poblacki testified that, as they approached the intersection from the west, the light was green for them; that, when they were fifteen or twenty feet from it, the light changed from green through amber, to red. At the time it changed, they were going 25 miles an hour, and stopped before reaching the intersection. They then saw defendant's car stop in the center of the street. Gabel testified that they were right up to the intersection when the light turned red; that they were just about 15 feet from the crossing when it turned red, going about 25 miles per hour; that they had the green light and when they got within 15 feet of the light he stopped his car suddenly when it changed red, stopping it practically abreast of the stop light; that the lights turned green for north and south traffic and red for east and west traffic when he stopped his car. He also testified on cross-examination that he could not say whether the light was green for north and south traffic at the time of the accident. He stated he just noticed the car as it stopped; it faced kind of an angle, then he saw the light green behind it. The first time he saw the plaintiff, the light was green for north and south traffic.

Plaintiff's first point is that she had a right to interrogate the jury as to their interest, if any, in the defendants' insurance

Finally, a witness for the plaintiff, was the driver of the bus. He stated that the light was red for north and south traffic when he approach the intersection; that some people got off and went on, and that between that and the time of the accident the lights might have changed, but that to his mind was the accident. He then was her walk to the west around the corner of the bus. The bus was about ten feet wide and he swerv a feet from the west curb.

The witnesses testified that they were riding with an Diversey in a car driven by Cobel. Neither one saw the accident. Cobel testified that, as they approached the intersection from the west, the light was green for them; that, when they were fifteen or twenty feet from it, the light changed from green through amber, to red. At the time it changed, they were going 25 miles an hour, and stopped before reaching the intersection. They then saw defendant's car stop in the center of the street. Cobel testified that they were right up to the intersection when the light turned red; that they were just about 15 feet from the crossing when it turned red, going about 25 miles per hour; that they had the green light and when they got within 15 feet of the light he stepped his car suddenly when it became red, stopping it practically opposite of the stop light; that the light turned green for north and south traffic and red for east and west traffic when he stopped his car. He also testified on cross-examination that he could not say whether the light was green for north and south traffic at the time of the accident. He stated he just noticed the car as it stopped; it faced kind of an angle, then he saw the light green behind it. The first time he saw the plaintiff, the light was green for north and south traffic.

Plaintiff's first point is that she has a right to introduce the jury as to their interest, if any, in the defendants' insurance

carrier. The record discloses that defendant, The Hoover Company, had two insurance carriers on the non-ownership automobile public liability insurance, and one in Workman's compensation and occupational disease. All the insurance companies had offices in the City of Chicago and it is contended that counsel for plaintiff should have been allowed to interrogate the jury on the voir dire, concerning their interest, if any. The court after the verdict called all the jurors up and asked them the question collectively. There had been filed in the record, an affidavit, similar to the one described in Smithers v. Henriquez, 368 Ill. 588, upon which case the plaintiff relies as an authority for the proposition that the court erred in denying her the right to interrogate the jurors on voir dire as to their interest, if any, in the insurance companies. In the Smithers case the Supreme Court in part said;

> "The proposed inquiry was disclosed to the court and opposing counsel in chambers and fully discussed before any attempt was made to interrogate the jurors. The record does not show the employment of any subterfuge to inform the jury that an insurance company was defending the suit, or any other improper motive or misconduct on the part of plaintiff's counsel. From the record it appears the inquiry was for the purpose of exercising the right of challenge."

The practice of so interrogating the jury was again approved by this court in Landess v. Mahler, 295 Ill. App. 498; La Rocco v. Antonello, 300 Ill. App. 608; and O'Neal v. Caffarello, 303 Ill. App. 574. Likewise, in Kavanaugh v. Parrett, 310 Ill. App. 429, the court held that the Smithers case was decisive of the question and that it was not error to allow the questions to be propounded to the jurors. In the instant case, however, the jurors were questioned following the verdict as to their interest, if any, in defendants' insurance carriers, and so far as the record discloses their answers were in the negative. Therefore, it would appear that no prejudice to plaintiff's rights arose by reason of the interest of any juror sworn to try the issues. As was said in O'Neal v. Caffarello, supra,

motive. The record indicates the attorney, the insurance company, and the insurance carriers in the non-cooperation automobile liability insurance, and the in-house's respondeat and occupational disease. If the insurance companies and officers in the City of Chicago and if it proceeded that counsel for plaintiff should have been allowed to interrogate the jury on the same line, concerning their interest, if any. The court after the verdict called all the jurors in and asked them the question collectively. There had been filed in the record, an affidavit, similar to the one described in Maldonado v. Sanchez, 386 Ill. 386, upon which case the plaintiff relies as an authority for the proposition that the court erred in denying her the right to interrogate the jurors as to their interest, if any, in the insurance companies. In the Maldonado case the Supreme Court in part said:

> "The proposed inquiry was disclosed to the court and opposing counsel in advance and fully discussed before any attempt was made to interrogate the jurors. The record does not show the existence of any motivation to induce the jury that an interference country was detecting the suit, or any other improper motive or misconduct on the part of plaintiff's counsel. From the record it appears the inquiry was for the purpose of ascertaining the right of challenge."

The practice of so interrogating the jury has again occurred in this court in Lindner v. Mohler, 396 Ill. App. 447; Lutkus v. Kotowski, 388 Ill. App. 309; and Cheek v. Duffield, 388 Ill. App. 274. Likewise, in Kirkwood v. Jewell, 410 Ill. App. 169, the court held that the witness was the matrix of the question and that it was not error to allow the questions to be propounded to the jurors. In the instant case, however, the jurors were examined following the verdict as to their interest, if any, in defendants' insurance carriers, and as far as the record discloses their answer were in the negative. Therefore, it would appear that no prejudice to plaintiff's rights arose by reason of the interest of any juror owns to his or her interest. As was said in Cheek v. Duffield, supra,

" * * * The ruling on a motion for leave to examine veniremen as to their connections with an insurance company where the defendant is covered by insurance, rests largely in the discretion of the trial court. * * *"

See also the decision of the Supreme Court in the case of Kavanaugh v. Parrett, 379 Ill. 273, which rests on a like holding.

The plaintiff further contends that there was sufficient evidence in the record to sustain a finding of reckless, wilful and wanton conduct or gross negligence on the part of defendant Meyers, and contends that the court erred in withdrawing from the jury the question of wilful and wanton conduct; that where there is any evidence in the record fairly tending to support the allegation, it becomes a question of fact for the jury, and that a motion to withdraw the wanton count must be considered in its most favorable aspect to the party against whomever the motion is directed. Defendants contend upon the facts appearing in the record that it is clearly apparent that there is nothing in the record upon which to base a charge of wilful and wanton misconduct; that there was no evidence of intentional injury and no evidence showing "such absence of care for the person of another as exhibits a conscious indifference to consequences"; and that in such a case a court is under a duty to direct a verdict for a defendant as to such charge. In Greene v. Noonan, 372 Ill. 286, which was a death case in which the trial court allowed a wilful and wanton count to go to the jury where there was no evidence to support it, the Supreme Court, in reversing and remanding the cause, said;

" * * * A defendant in a case of this character, facing a charge of wilful and wanton conduct, is placed at a serious disadvantage as compared with one charged merely with negligence, and where there is no evidence to support such charge, it is the court's duty, on motion, to withdraw such charge from the jury, and failure so to do is, by reason of the character of the charge, error requiring reversal of the judgment, for no one may know what influence the charge, though not proved, may have had upon the jury, particularly since it has not been informed that it was not to be considered by it. The distinction in law between wilful and wanton conduct and mere negligence is not a matter with which the average juror is familiar. * * *"

* * * * The petition for a motion for leave to produce witnesses on behalf of the defendant in support of his motion for a new trial, in which the defendant is charged in indictment, was filed in the District of the trial court. * * *

The also the decision of the District Court of the state of Indiana v. Jarrett, 279 Ind. 279, which rests on a like ruling.

The plaintiff further contends that there was sufficient evidence in the record to sustain a finding of negligence, willful and wanton conduct on gross negligence on the part of defendant Jarrett, and contends that the court erred in withdrawing from the jury the question of willful and wanton conduct; that where there is any evidence in the record tending to support the allegation, it becomes a question of fact for the jury, and that a motion to withdraw the matter from such be considered in the most favorable aspect to the party against whom the motion is directed.

Defendants contend upon the facts appearing in the record that it is clearly apparent that there is nothing in the record upon which to base a charge of willful and wanton misconduct; that there was no evidence of intentional injury and no evidence showing "such absence of care for the person or another as evidents a conscious indifference to consequences"; and that in such a case a court is under a duty to direct a verdict for a defendant as to such charge. In Jarrett v. Duncan, 279 Ind. 279, which was a death case in which the trial court allowed a willful and wanton count to go to the jury, where there was no evidence to support it, the Supreme Court, in reversing and remanding the cause, said:

* * * A defendant in a case of this character, facing a charge of willful and wanton conduct, is placed at a serious disadvantage as compared with the charge merely with negligence, and where there is no evidence to support such charge, it is the court's duty, on motion, to withdraw such charge from the jury, and failure so to do is, by reason of the character of the charge, error prejudicial to the defendant, for he may have had such influence on charge, though not proved, may have had upon the jury, particularly since it had not been informed that it was not to be considered in it. The distinction in law between willful and wanton conduct and mere negligence is not a matter with which the average juror is familiar. * * *

It is also suggested, and is the rule, that a finding of wilfulness and wantonness will be set aside if such a finding is against the manifest weight of the evidence. (Clark v. Hasselquist, 304 Ill. App. 41). Plaintiff argues, however, that the evidence introduced by her was sufficient to take the case to the jury on the question of wilfulness and wantonness, and lists as such evidence eleven items which she terms "salient facts showing wilful and reckless conduct". But, upon examination, they do not appear to have been sufficient to warrant the submission to the jury of the wilful count. The third item to which attention is called is that defendant's car was driven at a high rate of speed. There is nothing in the record, however, to support the contention. The testimony on the subject contradicts this statement. The defendant Meyer, the only witness to testify as to speed, stated that he was going about ten miles an hour. According to the testimony of plaintiff's witness, after the car stopped, the plaintiff was lying in the street only four or five feet back of the car. As suggested, it seems obvious that if defendant Meyer had been travelling at a "high rate of speed", the distance between his car and the plaintiff after the accident would have been greater than this distance. This court, in Clark v. Hasselquist, 304 Ill. App. 41, said;

> " * * * Excessive speed may or may not be evidence of wilful and wanton misconduct. The determining factor is the circumstances surrounding such excessive speed and the question is as stated in Streeter v. Humrichouse, supra, whether under the circumstances as they appear in this record did the speed at which appellant was driving show an entire absence of care for the safety of appellee and such as exhibited a conscious indifference to consequences? * * *."

Likewise, plaintiff's salient facts that (1) defendant's car went through "green" light, and (2) defendant's car went through light as "green" to "yellow" changed, (which statements presumably are intended to mean that the lights were against the defendant Meyer and that he either drove through the lights or while they were in the process of

It is also suggested, and is the rule, that a finding of carelessness and wantonness will be not made if such a finding is against the manifest weight of the evidence. (Klimp v. Bernstein, 99 Ill. App. 41). Plaintiff argues, however, that the evidence introduced by her was sufficient to take the case to the jury on the question of willfulness and wantonness, and lists as such evidence eleven items which she terms "salient facts showing willful and wanton conduct". But, upon examination, they do not appear to have been sufficient to warrant the submission to the jury of the ultimate issue. The third item to which attention is called is that automobile was not driven at a high rate of speed. There is nothing in the record, however, to support the contention. The testimony in the subject contradicts this statement. The defendant Meyer, the only witness to testify as to speed, stated that he was going about ten miles an hour. According to the testimony of plaintiff's witness, just as the car stopped, the plaintiff was lying in the street only four or five feet back of the car. As suggested, it seems obvious that if defendant Meyer had been travelling at a "high rate of speed", the distance between his car and the plaintiff after the accident would have been greater than this distance. This court, in Glenn v. Bernstein, 324 Ill. App. 41, said:

> " " " Excessive speed may or may not be evidence of willful and wanton misconduct. The determining factor is the circumstances surrounding such excessive speed and the question is as stated in Trexler v. Hawthorne, supra, whether under the circumstances as they appear in this record did the speed at which defendant was driving show an entire absence of care for the safety of others and such as exhibited a wanton indifference to consequences? " " ".

Likewise, plaintiff's salient facts that (1) defendant's car went through "green" light, and (2) defendant's car went through light as "green" to "yellow" changed, (which statements presumably are intended to mean that the lights were against the defendant Meyer and that he either drove through the lights or while they were in the process of

changing) do not appear sufficient for a finding of wilful and wanton misconduct. Plaintiff's other salient facts are (4) defendant's car weaved and wobbled as it came to a stop in the middle of Diversey, (5) defendant's car did not stop until it reached the middle of Diversey Boulevard, although plaintiff was struck in cross-walk, (8) defendant, Samuel Meyer, himself said he could stop his car within four feet and saw plaintiff eight feet away but did not stop, and (9) although he said he could stop his car within 3 or 4 feet, he traveled all the way to the middle of Diversey before he came to a stop. It does not appear from these statements that defendant Meyer's conduct was wilful and wanton, nor do they show a conscious disregard for the safety of others. As suggested, when a pedestrian suddenly hurries into traffic and runs into the side of the driver's car, any car would "weave and wobble" during the naturally startled driver's swerve to avoid the pedestrian. When we consider all the facts and the items called to our attention by plaintiff, we do not find sufficient evidence to hold the defendant Meyer guilty of wilful and wanton misconduct, and are of the opinion that the trial court properly withdrew from the jury the charge of wilfulness and wantonness.

A further question is urged, namely, that the court erred in giving and refusing to give certain instructions. Upon examination, it appears that neither the given nor refused instructions, to which plaintiff objects, are set out in plaintiff's brief; consequently, the court, without the task of examining the abstract or record, does not know what they contain and consequently cannot determine their applicability or lack of applicability. (Cory v. Woodman Accident Co. 253 Ill. App. 20; Wasilevitsky v. City of Chicago, 280 Ill. App. 531; Zorger v. Hillman's, 287 Ill. App. 357; Jones v. Keilbach, 309 Ill. App. 233).

It is urged by defendants that it does not appear that any objection to the court's refusal to give plaintiff's refused instruc-

ohan-ing) do not appear sufficient for a finding of willful and wanton misconduct. Plaintiff's other salient facts are (1) defendant's swerved and wobbled as it came to a stop in the middle of traffic, (2) defendant's car did not stop until it reached the middle of Waverly Boulevard, although plaintiff was almost in cross-walk, (3) defendant, Samuel Sayer, himself said he could stop his car within four feet and saw plaintiff eight feet away but did not stop, and (4) although he said he could stop his car within 3 or 4 feet, he instead all the way to the middle of Waverly before he came to a stop. It does not appear from these statements that defendant Sayer's conduct was willful and wanton, nor do they show a conscious disregard for the safety of others. As suggested, when a pedestrian suddenly darts into traffic and runs into the side of the driver's car, any car would "weave and wobble" during the naturally startled driver's efforts to avoid the collision. Then we consider all the facts and the items called to our attention by plaintiff, we do not find sufficient evidence to hold the defendant Sayer guilty of willful and wanton misconduct, and are of the opinion that the trial court correctly withdrew from the jury the charge of willfulness and wantonness.

A further question is urged, namely, that the court erred in giving and refusing to give certain instructions. Upon examination, it appears that neither the given nor refused instructions, to which plaintiff objects, are set out in plaintiff's brief; consequently, the court, without the task of searching the abstract or record, does not know what they contain and consequently cannot determine their applicability or lack of applicability. (Gorr v. Cochran Moldings Co. 242 Ill. App. 20; Malfavitsky v. City of Chicago, 320 Ill. App. 221; Lorner v. Hilman's, 327 Ill. App. 247; Jones v. Laibach, 308 Ill. App. 232).

It is urged by defendants that it does not appear that any objection to the court's refusal to give plaintiff's refused instruc-

tions was made by plaintiff before the jury's retirement. Section 67 of the Practice Act (Ill. Rev. St. 1939, Ch. 110, Par. 191), dealing with the instructing of juries, makes no reference to the time of making of objections to the court's action giving or refusing of instructions. Under these circumstances, it is urged, the common law prevails, and objections to the instructions have to be taken at the trial before the jury's retirement; and that the fact that section 80 of the Practice Act (Ill. Rev. St. 1939, Ch. 110, Par. 204) abolishes the necessity of formal exceptions does not dispense with the necessity of making some objections to the court's action if it feels it is wrong. However, the question before the court has been passed upon by this court in the case of Reilly Tar & Chemical Corp., v. Lewis, 312 Ill. App. 654, where the opinion of the Supreme Court in the case entitled Department of Public Works and Buildings v. Barton, 371 Ill. 11, was cited. Under the doctrine of that case it is unnecessary at the present time to object or except to the giving or refusal of instructions before the jury retired to consider their verdict. A litigant may object to giving or refusal of instructions in his motion for new trial, which was done in the instant case.

As before stated, the fact is that plaintiff did not incorporate in her brief the instructions therein complained of, with the result that defendants were deprived of an opportunity to answer the questions and theories raised as to the applicability and propriety of the complained of instructions. Defendants do, however, seek to anticipate in their brief some of the matters regarding these complained of instructions which might be called to our attention in plaintiff's reply brief. However, the instructions complained of are not recited in the language of the instructions by defendants, which fact will prevent this court from considering the instructions as presented to the trial court.

claims now made by plaintiff before the jury's deliberation. Section 67 of the Practice Act (111. Rev. St. 1956, Ch. 110, Par. 101), dealing with the instructing of juries, makes no reference to the time of making of objections to the court's action giving or refusing of instructions. Under these circumstances, it is urged, the common law prevails, and objections to the instructions need not be made at the trial before the jury's retirement; and that the last sentence of the Practice Act (111. Rev. St. 1956, Ch. 110, Par. 104) declaring the necessity of formal exceptions does not diminish the necessity of making such objections to the court's action if it fails to do so. However, the question before the court has been passed upon by this court in the case of Ability for a Beautiful Home v. Lemon, 7 Ill. App. 2d, 464, where the opinion of the Appellate Court in the case entitled Department of Public Works and Buildings v. Barnes, 371 Ill. 11, was cited. Under the rulings of that case it is unnecessary at the present time to object or except to the giving or refusal of instructions before the jury retired to consider their verdict. A litigant may object to giving or refusal of instructions in his motion for new trial, which was done in the instant case.

As before stated, the fact is that plaintiff did not incorporate in her brief the instructions therein mentioned of, with the result that defendants were deprived of an opportunity to answer the questions and theories raised as to the applicability and propriety of the specimens of instructions. Defendants do, however, set forth authorities in their brief some of the matters regarding these specimens of instructions which might be called to our attention in plaintiff's reply brief. However, the instructions complained of are not contained in the language of the instructions by defendants, which fact will prevent this court from considering the instructions as presented to the trial court.

The plaintiff contends that the court erred in requiring counsel to admit he was wrong and advising the jury that the insurance company carriers of the defendants were not required to keep and maintain their records here in this state, and states that during the trial counsel for plaintiff had subpoenaed the books, records and other documents of the insurance carriers, for the purpose of combatting the defense of independent contractor raised by the defendant, The Hoover Company, who contended that defendant Meyer was not an employee, but an independent contractor. It appears, however, that the record is silent as to any such ruling of the court upon any such question. The only thing in the record having even a remote connection with the point is a question asked by plaintiff's attorney of the branch manager of defendant Hoover Company, upon whom a subpoena had been served. The witness had stated that certain insurance policies asked for by the subpoena were not available as they were in the Home Office of the Hoover Company, which is a foreign corporation. The witness was then asked, "Are you familiar with the requirements of the statute that you are required to keep your records in this state concerning business done in this state?" He answered that he was not. Defendants point out that this is all that there is in the record. It is not a ruling of the court, nor is there anything to show that the court required plaintiff's attorney to state that he was in error or that plaintiff's attorney did so state. And, with nothing in the record, it is obvious that there is nothing before this court, and the court cannot consider plaintiff's objection.

The plaintiff advances two objections to the written statement of the witness Poblacki introduced by defendants as an impeaching exhibit; first, that it should not have been taken by the jury upon its retirement, and, second, that it was not addmissible in evidence. Defendants' reply is that these contentions are not properly before this

The plaintiff contends that the court erred in rendering judgment in favor of the defendants, for the purpose of conferring the defense of independent contractor raised by the defendant, the Dover Company, who contended that defendant Sayer was not an employee, but an independent contractor. It appears, however, that the record is silent as to any such ruling of the court upon any such question. The only thing in the record having such a remote connection with the point is a question asked by plaintiff's attorney of the business manager of defendant Dover Company, such when a subpoena had been served. The witness had stated that certain insurance policies issued for by the subpoena were not available as they were in the home office of the Dover Company, which is a foreign corporation. The witness was then asked, "Are you familiar with the requirements of the statute that you are required to keep your records in this state concerning business done in this state?" He answered that he was not. Defendants point out that this is all that there is in the record. It is not a ruling of the court, nor is there anything to show that the court required plaintiff's attorney to state that he was in error or that plaintiff's attorney did so state. Not, with nothing in the record, it is obvious that there is nothing before this court, and the court cannot consider plaintiff's objection.

The plaintiff assigns two objections to the written statement of the witness Tobiasch introduced by defendants as an impeachment exhibit; first, that it should not have been taken by the jury upon its retirement, and, second, that it was not admissible in evidence. Defendants' reply is that these contentions are not properly before this

court for the following reasons: (a) there is nothing in the record to indicate that the jury took the statement to the jury room; (b) that if the statement can be considered as having been taken, no objection to its being taken appears in either the record or the abstract; (c) neither the written statement itself nor its substance is set forth in plaintiff's abstract, and that it is not the duty of the reviewing court to search through the record in order to pass upon an alleged error (citing People v. Hunsaker, 306 Ill. App. 476), and that a court will not search the transcript of record for the purpose of finding a cause for reversal (citing Murphy v. Brichler, 305 Ill. App. 6; and O'Meara v. C. M. & St. P. & P. Railroad, 367 Ill. 82); and (d) that the written statement of the witness was in fact admissible, that it contained nothing but facts, that it did not contain matters of opinion blended with facts, and that even if it had contained both, under plaintiff's own authorities, no reversible error was committed, as she did not object to the part that was opinion and asked no instruction that the consideration of the jury be limited to the part that was fact. Therefore, as stated by defendants, if plaintiff does not put the statement or its substance in the abstract and if the record does not show that it in fact went to the jury and that plaintiff objected to its going (if it did go), then obviously there is nothing before this court. And, the statement appears to have been introduced solely for the purpose of impeaching the witness who had testified contrary to the signed statement. Under the circumstances, we believe the court properly permitted the introduction of the statement in evidence.

A further point urged is that defendant Meyer was an independent contractor, and that, therefore, the Hoover Company was not liable for any misconduct on his part. However, the jury found the defendant Meyer not guilty, which would relieve the Hoover Company of any liability, even if Meyer was its agent, because it could only be

court for the following reasons: (a) there is nothing in the record to indicate that the jury took the statement to the jury room; (b) that if the statement can be considered as having been taken, no objection to its being taken appears in either the record or the briefs; (c) neither the written statement itself nor its substance is set forth in plaintiff's abstract, and that it is not the duty of the reviewing court to search through the record in order to find some or alleged error (citing Jones v. Sumner, 306 Ill. App. 378), and that a court will not weigh the testimony of record for the purpose of finding a cause for reversal (citing Murray v. Keighley, 306 Ill. App. 6; and O'Neill v. C. B. & Q. R. R. Co. Dairyland, 307 Ill. 607; and (d) that the written statement of the witness was in fact admissible, that it contained nothing but facts, that it did not contain matters of opinion blended with facts, and that even if it had contained such, under plaintiff's own authorities, no reversible error can result, as she did not object to the part that was opinion and asked no instruction that the consideration of the jury be limited to the part that was fact. Therefore, as stated by defendants, if plaintiff does not put the statement or its substance in the abstract and if the record does not show that it in fact went to the jury and that plaintiff objected to its going (if it did go), then obviously there is nothing before this court. And, the statement appears to have been introduced solely for the purpose of impeaching the witness who had testified contrary to the signed statement. Under the circumstances, we believe the court properly admitted the introduction of the statement in evidence.

A further point urged is that defendant Oster was an independent contractor, and that, therefore, the Hoover Company was not liable for any misconduct on his part. However, the jury found the defendant Oster not guilty, which would relieve the Hoover Company of any liability, even if Oster was its agent. Because it could only be

held on the doctrine of respondeat superior. Therefore, it is not necessary for this court to further consider whether or not the defendant Meyer was an independent contractor.

The plaintiff contends that the trial court erred in sustaining the defendant's objections to plaintiff's line of cross-examination of the witness Hanselman, who was called and testified at the request of the defendants. Of course, it is understood and to be remembered that the latitude allowed on cross-examination rests very largely in the discretion of the trial court, and where there has not been a clear abuse of the discretion, the ruling will not be disturbed. It appears from the record that defendants, in their case, called Hanselman, an investigator, as to the taking of the statement made by the witness Poblacki to show that it was in the same condition as when it was signed by Poblacki. Of course, plaintiff, had the right to attempt to weaken and discredit the testimony of this witness, but all that plaintiff was entitled to show was that this witness was working on behalf of the defendants, and this is what was shown by the witness' testimony on cross-examination. He testified that he interviewed Poblacki on behalf of the defendants. As to the competency of the cross-examination, this court has examined the record and we are of the opinion that the court did not err as suggested by plaintiff, and that plaintiff's case was not prejudiced.

The judgment entered on the verdict in this case will, therefore, be affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and KILEY, J. CONCUR.

nals on the doctrine of *res judicata* *judicata*. Therefore, it is not necessary for this court to further consider whether or not the original error was an intermediate continuation.

The plaintiff contends that the trial court erred in excluding the defendant's objections to plaintiff's line of cross-examination of the witness Hamilton, who was called and testified at the request of the defendants. Of course, it is understood and is no controversy that the latitude allowed on cross-examination rests very largely in the discretion of the trial court, and where there has not been a clear abuse of the discretion, the ruling will not be disturbed. It appears from the record that defendants, in their case, called Hamilton, on investigation, as to the truth of the statement made by the witness Tolbert to show that it was in the best condition at when it was signed by Tolbert. Of course, plaintiff, had the right to attempt to weaken and discredit the testimony of this witness, but all that plaintiff was entitled to show was that this witness was working on behalf of the defendants, and this is what was shown by the witness' testimony on cross-examination. He testified that he interviewed Tolbert on behalf of the defendants. As to the competency of the cross-examination, this court has reviewed the record and is are of the opinion that the court did not err as suggested by plaintiff, and that plaintiff's case was not prejudiced.

The judgment entered on the verdict in this case will, therefore, be affirmed.

ATTORNEY AFFIRMED.

WEBB, C.J. and ELLIT, J. concur.

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317 I.A. 383

THEODORA WEINSTEIN and MEYER WEINSTEIN by HARRY GERSTEIN, their next friend GERTRUDE WEINSTEIN SHAPIRO, and JOSEPH WEINSTEIN, Appellees,	
v.	INTERLOCUTORY
SAMUEL N. LEVIN and NATHAN M. KANTER and MINNIE WEINSTEIN,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
ON APPEAL OF SAMUEL N. LEVIN and NATHAN M. KANTER, Appellants.	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Samuel N. Levin and Nathan M. Kanter, two of the defendants, appeal from an interlocutory injunction entered on a verified complaint, without notice or bond or any showing that complainants would be unduly prejudiced by the giving of notice or why a bond should not be required, in accordance with the provisions, respectively, of sections 3 and 9 of the Injunction Act (Ill. Rev. Stat. 1941, ch. 69); and also from an order of the court denying defendants' motion to vacate the interlocutory order.

The subject matter of the complaint involves a partnership accounting between the children of Abe Weinstein, one of the partners who died in 1938, Samuel N. Levin, the other partner, and Nathan M. Kanter, who advanced $6,000 to the partnership at its inception in 1932 under an agreement by which he was to receive as compensation for the use of the money advanced 15 per cent of the gross receipts of the partnership, which was engaged in operating a currency exchange. The complaint charges that after Weinstein's death, Levin, in violation of the statute, continued to operate the business under an agreement with Weinstein's widow, which provided for stipulated salaries for the new partners and an equal division of the profits, and for the continuation in full force and effect of Kanter's $6,000 loan.

THEODORA WEINSTEIN and MARY A. WEINSTEIN,
by HARRY CHASTIN, their next friend
CENTRAL WEINSTEIN MANTRO, and
LOU PA WEINSTEIN,

Appellees,

v.

SAMUEL N. LEVIN and NATHAN A. KANTER
and LEMMIE WEINSTEIN,

ON APPEAL OF SAMUEL N. LEVIN and
NATHAN A. KANTER,

Appellees.

MR. JUSTICE FRIEDMAN DELIVERED THE OPINION OF THE COURT.

Samuel N. Levin and Nathan A. Kanter, two of the defendants, appeal from an interlocutory injunction entered on a verified complaint, without notice or bond or any showing that complainants would be unduly prejudiced by the giving of notice or why a bond should not be required, in accordance with the provisions, respectively, of sections 3 and 9 of the Injunction Act (Ill. R.v. Stat. 1941, ch. 69); and also from an order of the court denying defendants' motion to vacate the interlocutory order.

The subject matter of the complaint involves a partnership accounting between the children of Abe Weinstein, one of the partners who died in 1929, Samuel N. Levin, the other partner, and Nathan A. Kanter, who advanced $6,000 to the partnership at its inception in 1922 under an agreement by which he was to receive as compensation for the use of the money advanced 15 per cent of the gross receipts of the partnership, which was engaged in operating a currency exchange. The complaint charges that after Weinstein's death, Levin, in violation of the statute, continued to operate the business under an agreement with Weinstein's widow, which provided for stipulated salaries for the new partners and an equal division of the profits, and for the continuation in full force and effect of Kanter's $6,000 loan.

It is further alleged that Kanter's loan, with the provision that he was to receive 15 per cent of the gross partnership receipts, was a usurious transaction, that the sums paid to him over a period of years were in excess of the legal rate of interest permitted under the laws of this state; and plaintiffs seek an accounting of all dealings between Kanter and the partnership from its inception in 1932, as well as an accounting of all moneys paid to the defendants Kanter, Levin and Minnie Weinstein; and they asked and procured a temporary injunction restraining defendants from collecting or withdrawing any partnership funds, except for actual operating expenses, or from using or applying such funds to their own use, or transferring or assigning any interest in the partnership business.

It clearly appears from affidavits presented in support of defendants' motion to dissolve, that the injunction was entered without notice, and the order provides that "for good cause shown" it should "issue without bond."

The statutory provisions invoked by defendants for reversal of the interlocutory order are: Section 3 of chap. 69 provides that "No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without such notice." Section 9 provides that "In all other cases [except where an injunction shall issue to enjoin a judgment, as provided in section 8], before an injunction shall issue, the plaintiff shall give bond in such penalty, and upon such condition and with such security as may be required by the court, judge or master granting or ordering the injunction: Provided, bond need not be required when, for good cause shown, the court, judge or master is of opinion that the injunction

It is further alleged that Kanter's loan, with the provision that he was to receive 15 per cent of the gross partnership receipts, was a usurious transaction, since the sums paid to him over a period of years were in excess of the legal rate of interest permitted under the laws of this state; and plaintiffs seek an accounting of all dealings between Kanter and the partnership from its inception in 1932, as well as an accounting of all moneys paid to the defendants Kanter, Levin and Minnie Schlesinger; and they asked and procured a temporary injunction restraining defendants from collecting or withdrawing any partnership funds, except for actual operating expenses, or from using or applying such funds to their own use, or transferring or assigning any interest in the partnership business.

It clearly appears from affidavits presented in support of defendants' motion to dissolve, that the injunction was entered without notice, and the order provides that "for good cause shown" it should "issue without bond."

The statutory provisions involved by defendants for reversal of the interlocutory order are: Section 3 of chap. 67 provides that "No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without such notice." Section 9 provides that "In all other cases [except where an injunction shall issue to enjoin a judgment, as provided in section 8], before an injunction shall issue, the plaintiff shall give bond in such penalty, and upon such condition and with such security as may be required by the court, judge or master granting or ordering the injunction: Provided, bond need not be required when, for good cause shown, the court, judge or master is of opinion that the injunction

ought to be granted without bond."

The courts of this state have "spoken many times in no uncertain voice in condemnation of the practice of granting an injunction without notice unless it is made clearly and indisputably to appear from facts recited and verified, that the rights of a complainant will be unduly prejudiced unless the same be granted without notice," and that "No presumptions are to be indulged in favor of action without notice, but parties must, on facts stated and sworn to, bring themselves within the exception of the statute *** [and] Failing so to do, an injunction granted will be held to be improvident and dissolved." Brin v. Craig, 135 Ill. App. 301. This interpretation of the statute has been consistently followed through a long line of decisions by reviewing courts of this state. See Rieder v. White, 160 Ill. App. 576. Numerous later cases are also cited by defendants.

This rule is not seriously questioned by plaintiffs, but they cite and rely on cases holding that where it appears from the complaint that the rights of a complainant might have been unduly prejudiced if notice had been required, the injunction will issue without notice, Skelers v. Meyer, 246 Ill. App. 18; Loftis v. Loftis, 225 Ill. App. 478, and their counsel argue that from the allegations of the complaint at bar "the court could infer that if notice *** were served upon the defendants they could make an immediate assignment or transfer of the assets of the partnership, or repay the loan of Six thousand ($6,000) Dollars to Kanter and thereby destroy the plaintiffs' claim of usury, before an injunction order could be entered." This argument ignores the rule that "No presumptions are to be indulged in favor of action without notice ***" (Brin v. Craig, supra), and that "either in the bill or affidavit such facts must be stated from which the court can see that irreparable injury will ensue unless the injunctional order prayed for is issued without notice." (Rieder v. White, supra.)

ought to be granted without hood."

The courts of this state have "spoken many times in no uncertain voice in condemnation of the practice of granting an injunction without notice unless it is made clearly and indisputably to appear from facts recited and verified, that the rights of a complainant will be unduly prejudiced unless the same be granted without notice," and that "No presumptions are to be indulged in favor of action without notice, but parties must, on facts stated and sworn to, bring themselves within the exception of the statute *** [and] failing so to do, an injunction granted will be held to be improvident and dissolved." Bruin v. Crain, 129 Ill. App. 202. This interpretation of the statute has been consistently followed through a long line of decisions by reviewing courts of this state. See Lieber v. White, 160 Ill. App. 376. Numerous later cases are also cited by defendants.

This rule is not seriously questioned by plaintiffs, but they cite and rely on cases holding that where it appears from the complaint that the rights of a complainant might have been unduly prejudiced if notice had been required, the injunction will issue without notice, Sklaire v. Sayer, 246 Ill. App. 16; Loftis v. Loftis, 229 Ill. App. 478, and their counsel argue that from the allegations of the complaint at bar "the court could infer that if notice *** were served upon the defendants they could make an immediate assignment or transfer of the assets of the partnership, or repay the loan of six thousand ($6,000) dollars to Kanter and thereby destroy the plaintiffs' claim of usury, before an injunction order could be entered." This argument ignores the rule that "No presumptions are to be indulged in favor of action without notice *** (Bruin v. Crain, supra), and that "either in the bill or affidavit such facts must be stated from which the court can see that irreparable injury will ensue unless the injunctional order prayed for is issued without notice." (Lieber v. White, supra.)

The complaint in this proceeding contains no allegations that defendants, or any of them, threatened or even considered transferring assets, or repaying the Kanter loan, or that plaintiffs had any reason to fear or anticipate that they would do so. The argument that such a possibility existed is pure conjecture. All inferences with respect to the Kanter loan are to the contrary, because if any of the partnership rights were to be jeopardized through repaying Kanter, Levin and Mrs. Weinstein, who had substantial interests in the partnership, would certainly not be likely to do so. Levin and Mrs. Weinstein had carried on the business for about six years after her husband's death, and were still doing so when the complaint was filed. During those years they had continued to use Kanter's money, and evidently considered it an advantage to continue the business and not repay the loan.

What has been said with respect to the issuance of an injunction without notice, is also applicable to the statutory requirement for a bond. The mere recital in the order that "for good cause shown" the bond is excused, "is wholly insufficient since no good cause is shown by the record." Wagner v. Okner, 306 Ill. App. 601. The statute provides that "plaintiff shall give bond," except for good cause shown, and this requires a showing by allegations of fact that no injury will result if the statutory requirement be excused. The purpose of the bond is to secure defendants for damages which may be assessed, in the event the injunction is wrongfully issued, and defendants should not be deprived of this security, except where a showing is made that complainant is unable to give bond, or that he is capable of responding in damages, or that no injury can result if the bond is excused.

Other arguments are advanced relating to the merits of the controversy which cannot properly be determined on this appeal, but upon the face of the record we think the injunction was improvidently issued for the reasons stated, and the order is therefore reversed.

ORDER REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

The complaint in this proceeding contains no allegations that defendants, or any of them, threatened or even considered transferring assets, or repaying the Kanter loan, or that plaintiffs had any reason to fear or anticipate that they would do so. The argument that such a possibility existed is pure conjecture. All inferences with respect to the Kanter loan are to the contrary, because if any of the partnership rights were to be jeopardized through repaying Kanter, Levin and Mrs. Weinstein, who had substantial interests in the partnership, would certainly not be likely to do so. Levin and Mrs. Weinstein had carried on the business for about six years after her husband's death, and were still doing so when the complaint was filed. During these years they had continued to use Kanter's money, and evidently considered it an advantage to continue the business and not repay the loan.

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Other arguments are advanced relating to the merits of the controversy which cannot properly be determined on this appeal, but upon the face of the record we think the injunction was improvidently issued for the reasons stated, and the order is therefore reversed.

Reversed.

Sullivan, P. J., and Scanlan, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
v.	CRIMINAL COURT,
JESSE HARRISON, PAUL McCOY, FRANK TORNABENE, STEVE RADAHA, SAM MONFORTI, and SAM MARSALA, Plaintiffs in Error,	COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

317 I.A. 460

I

Defendants and Thomas H. Caradine were indicted for a conspiracy to violate the Election Laws at the mayoralty election held in Chicago, April 4, 1939. The indictment was returned February 29, 1940. The trial began January 6, 1941. The cause was submitted to the jury January 22, 1941. After deliberating twenty hours a verdict of guilty against all defendants was returned, fixing their punishment at imprisonment in the penitentiary. Motions for a new trial and in arrest were overruled and judgment enterednaccording to the verdict of the jury.

The unlawful acts charged were in connection with the election conducted in the 15th precinct of the 42nd ward of the City of Chicago. Defendants McCoy and Caradine acted as Republican judges. Defendant Frank Tornabene was Democratic clerk and Ada Stevens was Republican clerk. She died pending these proceedings. Harrison was Democratic judge. Marsala was a watcher for the Election Commissioners. Monforti was also a watcher, and Radaha was without official status.

Caradine testified for the State. At the close of the trial the indictment was nollied as to him. The verdict returned was against Harrison, McCoy, Torabene, Radaha, Marsala and Monforti.

II

There was a preliminary motion that the State be required to elect on which of the several conspiracies alleged it would rely.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JESSE HARRISON, PAUL MOODY, FRANK TORNABENE, STEVE LADAHA, SAM MORETTI, and SAM MARCALA,
Plaintiffs in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I

Defendants and Thomas G. Caradine were indicted for a conspiracy to violate the election laws at the aldermanic election held in Chicago, April 4, 1939. The indictment was returned February 29, 1940. The trial began January 6, 1941. The cause was submitted to the jury January 22, 1941. After deliberating twenty hours a verdict of guilty against all defendants was returned, fixing their punishment at imprisonment in the penitentiary. Motions for a new trial and in arrest were overruled and judgment entered according to the verdict of the jury.

The unlawful acts charged were in connection with the election conducted in the 15th precinct of the 42nd ward of the City of Chicago. Defendants Moody and Caradine acted as Republican judges. Defendant Frank Tornabene was Democratic clerk and Ada Stevens was Republican clerk. She died pending these proceedings. Harrison was Democratic judge. Marcala was a watcher for the Election Commissioners. Moretti was also a watcher, and Radaha was without official status.

Caradine testified for the State. At the close of the trial the indictment was nolled as to him. The verdict returned was against Harrison, Moody, Tornabene, Radaha, Marcala and Moretti.

II

There was a preliminary motion that the State be required to elect on which of the several conspiracies alleged it would rely.

The motion (denied) was renewed at the close of all the evidence and again denied. It is argued the court erred in denying this motion. The indictment alleged defendants conspired "together with each other and with divers other persons whose names are unknown" to make a false canvass of the votes cast in the precinct, and to sign, publish and deliver "a false return of said election" and "a false statement of the result of said election in said precinct and of the total number of votes cast in said precinct for divers candidates" and "a false certificate certifying the correctness of said starement". The indictment then goes on to state the particular acts of the accused to that end. There was only one count in the indictment. In support of their contention the court erred in failing to require the State to elect, defendants say that only the defendants who were election officials could have been guilty of making a false canvass or delivering a false return; that only the three watchers could have been guilty of causing the judges and clerks to do this. The judges and clerks, it is said, could not "induce themselve" to make a false canvass or return. There were, it is said, two groups of defendants: first, election officials, who could make a false canvass or false return; second, the watchers, who might have induced the officials to do so. In other words, it is argued that the indictment does not charge a single offense in varying language but in a single count charges two classes of defendants with distinct and different offenses. Goodhue v. People, 94 Ill. 37; People v. Wolf, 358 Ill. 334; Johnson v. People, 124 Ill. App. 213, are cited. We are not convinced. The indictment was in a single count. Defendants made no motion to quash it. The conspiracies described in the indictment did not proceed out of distinct and different transactions. Therefore, the People were not required to elect. People v. Pulliam, 352 Ill. 318, 320, People v. Curran, 286 Ill. 302, 312. Moreover, those advising, assisting or abetting (if any did so) were just as guilty as the principals. People v. Van Bever, 248 Ill. 136; Lionetti v. People, 183 Ill. 253. The point is well answered in the Curran case (above cited):

The motion (denied) was renewed at the close of all the evidence and again denied. It is argued the court erred in denying the motion. The indictment alleged defendants conspired "together with each other and with divers other persons whose names are unknown" to make a false canvass of the votes cast in the precinct, and to sign, publish and deliver "a false return of said election" and "a false statement of the result of said election in said precinct and of the total number of votes cast in said precinct for divers candidates" and "a false certificate certifying the correctness of said statement". The indictment then goes on to state the particular acts of the accused to that end. There was only one count in the indictment. In support of their contention the court erred in failing to require the state to elect, defendants say that only the defendants who were election officials could have been guilty of making a false canvass or delivering a false return; that only the three watchers could have been guilty of causing the judges and clerks to do this. The judges and clerks, it is said, could not "induce themselve" to make a false canvass or return. There were, it is said, two groups of defendants: first, election officials, who could make a false canvass or false return; second, the watchers, who might have induced the officials to do so. In other words, it is argued that the indictment does not charge a single offense in varying language but in a single count charges two classes of defendants with distinct and different offenses. Goodman v. People, 94 Ill. 37; People v. Kyle, 288 Ill. 334; Johnson v. People, 124 Ill. 139. 313, are cited. We are not convinced. The indictment was in a single count. Defendants made no motion to quash it. The conspiracies described in the indictment did not proceed out of distinct and different transactions. Therefore, the people were not required to elect. People v. Pulliam, 352 Ill. 316, 320. People v. Curran, 288 Ill. 302, 312. Moreover, those advising, assisting or abetting (if any did so) were just as guilty as the principals. People v. Van Beuer, 248 Ill. 138; Lionetti v. People, 183 Ill. 293. The point is well answered in the Curran case (above cited):

> "The conspiracies charged * * * were different parts of one conspiracy and the right to demand an election does not apply in such case."

III

It is contended the court permitted the improper use of memoranda by witnesses Keil and Dineen for the prosecution. These witnesses were clerks in the office of the Election Commissioners. On December 12, 1939, Keil opened the ballot boxes and with the aid of another employee, Czosek, recounted the ballots. Dineen on December 19, 1939, and April 4, 1939, took the ballot boxes before the Grand Jury and opened them. Each of these witnesses testified that he made memoranda as to the condition of the boxes and the ballots, etc. at these times. The memoranda were in their own handwriting. They did not have an independent recollection with reference to the facts appearing in the memoranda. They were not asked the precise question as to whether the memoranda made by them were true and accurate, but they did say that they were able to testify as to the facts after reading the same and a necessary inference was that the memoranda were true and accurate. The court over the objection of defendants ruled that the witnesses might hold the memoranda in their hands and refresh their memory therefrom as they went along.

In Koch v. Pearson, 219 Ill. App. 468, this court gave careful consideration to the question of when a writing of this kind, made at or near to the time of the occurrence, was admissible in evidence. We there reviewed the authorities at length. We said:

> "Where a witness testifies that he made a written report or memoranda of the occurrence at or near the time of its happening, but that upon examination of it he has no present recollection of the matters therein stated except that he knows that it is correct, then such report or memoranda is admissible in evidence."

The defendants cite Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 346, and People v. Greenspawn, 346 Ill. 484, 492. Defendants say there was no foundation laid for the introduction of the exhibits and that on no legal principle could the reading of these be justified. We

> "The conspiracies charged * * * were different parts of one conspiracy and the right to demand an election does not apply in such case."

III

It is contended the court permitted the improper use of memoranda by witnesses Xeil and Dineen for the prosecution. These witnesses were clerks in the office of the Election Commissioners. On December 12, 1929, Xeil opened the ballot boxes and with the aid of another employee, Crosek, recounted the ballots. Dineen on December 19, 1929, and April 4, 1930, took the ballot boxes before the grand jury and opened them. Each of these witnesses testified that he made memoranda as to the condition of the boxes and the ballots, etc. at these times. The memoranda were in their own handwriting. They did not have an independent recollection with reference to the facts appearing in the memoranda. They were not asked the precise question as to whether the memoranda made by them were true and accurate, but they did say that they were able to testify as to the facts after reading the same and a necessary inference was that the memoranda were true and accurate. The court over the objection of defendants ruled that the witnesses might hold the memoranda in their hands and refresh their memory therefrom as they went along.

In Koch v. Pearson, 219 Ill. App. 488, this court gave careful consideration to the question of when a writing of this kind, made at or near the time of the occurrence, was admissible in evidence. In there reviewed the authorities at length. He said:

> "Where a witness testifies that he made a written report or memoranda of the occurrence at or near the time of its happening, but that upon examination of it he has no present recollection of the matters therein stated except that he knows that it is correct, then such report or memoranda is admissible in evidence."

The defendants cite Diamond Glue Co. v. Pietrzykowski, 227 Ill. 338, 348, and People v. Brandenburg, 346 Ill. 484, 492. Defendants say there was no foundation laid for the introduction of the exhibits and that on no legal principle could the reading of these be justified. To

think the record does not justify this statement. The writings were in the handwriting of the witnesses and were made at the time the events occurred, to which they testified. While the precise question as to the truth and accuracy of the same was not asked, the testimony of the witnesses shows that to be a necessary inference.

The situation was not unlike that which existed in Allegretti v. Murphy-Miles Oil Co., 280 Ill. App. 378, where this court said:

> "It has been held that where a writing has been made by the witness or at his direction at the time of the fact, for the purpose of preserving the memory of it, if at the time of testifying he can recollect nothing further than that he had accurately reduced the whole transaction to writing, the writing itself may be admitted in evidence."

Among the many cases cited as sustaining this statement of the law is People v. Greenspawn, 346 Ill. 484, on which the defendants rely. The Supreme Court there said: (page 493)

> "It has been held that where a writing has been made by the witness at the time of the fact for the purpose of preserving the memory of it, if at the time of testifying he can recollect nothing further than that he had accurately reduced the whole transaction to writing the writing itself may be admitted in evidence to go to the jury."

It would ordinarily be quite impossible for any witness to remember precisely everything about the condition of the ballots and the boxes at the time the same were opened and the memoranda were obviously made for the purpose of preserving the facts. In a situation like this something must be left to the discretion of the trial judge. We hold the judge did not abuse his discretion in this respect and that at any rate the defendants were not legally prejudiced by admission of this evidence.

IV

It is next contended the court erred in redeiving in evidence alleged conversations of defendants subsequent to the return of the indictment. Mrs. Brady Cole, a witness for the State, gave testimony to the effect that when the case was on trial defendant Monforti came to her home, asked her to be lenient, said something about her going

think the record does not justify this assessment. The writings were in the handwriting of the witnesses and were made at the time the events occurred, to which they testified. While the wrongful question as to the truth and accuracy of the same was not asked, the testimony of the witnesses shows that to be a necessary inference.

The situation was not unlike that which existed in Illinois v. Murphy-Wilce Oil Co., 280 Ill. 370, where this court said:

> "It has been held that where a writing has been made by the witnesses or at his direction at the time of the fact, for the purpose of preserving the memory of it, if at the time of testifying he can recollect nothing further than that he had accurately reduced the whole transaction to writing, the writing itself may be admitted in evidence."

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VI

It is next contended the court erred in receiving in evidence alleged conversations of defendants subsequent to the return of the indictment. Mrs. Brady Cole, a witness for the State, gave testimony to the effect that when the case was on trial defendant Sunforth came to her home, asked her to be lenient, said something about her going

away and that if she would she would not have to worry about expenses. The court instructed the jury this testimony should be considered by them only as to Monforti and specially limited it to him. Defendants argue the testimony was not competent even as to Monforti because the conversation was held months after the termination of the conspiracy, and cite People v. Deal. 357 Ill. 634; People v. Black, 367 Ill. 209; People v. Spaulding, 309 Ill. 292; People v. Rappaport, 364 Ill. 238. It is admitted that where physical violence has been used under like circumstances, evidence of it will be admitted, as in People v. Spaulding, 309 Ill. 292; People v. Bloom, 370 Ill. 144. But defendants argue it would be dangerous to extend this doctrine to conspiracy cases unless all the conspirators participated in the conversation. It was (they say) "poisonous and prejudicial" testimony. We hold the point has already been decided contrary to defendants' contention. Wharton's Crim. Evid. 11th ed., Vol. 1, Sec. 306, p. 410; also Vol. 2, p. 1205; People v. Throop, 359 Ill. 354, 361; Smith v. Tate, 171 S. E. 578; Watson v. State, 146 So. 122, 127; People v. Strait, 279 S. W. 109, 114; People v. Emory, 226 Pac. 754, 756; Fox v. People, 269 Ill. 300, 322. Monforti testified, denying he made the statements attributed to him but admitting that he talked with the witness at the time in question.

V

Defendants next earnestly contend their conviction was obtained by unfair tactics, citingnwith other cases People v. Blockburger, 354 Ill. 301, 306. One instance complained of is that police officer Neary, who had been seated immediately behind the State's Attorney in the trial until the end of the afternoon session, on Monday, January 13, 1941, arrested Monforti at the entrance to the court room. This is said to have been without excuse, since Monforti was a married man, was under a surety bond, had, lived for fifteen years in Chicago and was not guilty of conduct which would indicate he was about to, leave the jurisdiction. Another complaint is made that the daily press unfairly featured the story of the arrest of Monforti. The headlines are described as "vicious". The jury were not locked up. They went to their homes each night.

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Defendants made a motion for mistrial because of these occurrences, and their motion was denied. Defendants say the publicity given by the press was deliberately planned. Frank Pecoraro, a defense witness, testified on January 16, 1941. He said he had been threatened after the adjournment of court. On the following morning (Friday) defendants say the State's Attorney entered the court room accompanied by two policemen, and as Pecoraro was leaving the court room he was taken into custody by the officers. Defendants asked leave to interrogate the jury on this situation in order to determine whether the jury had knowledge of these things or was influenced by them. Their request was denied. People v. Duncan, 261 Ill. 339, is cited to the point that the denial of this motion was error; also State v. Clark, 27 Idaho 48, and Mitchell v. State, 114 Texas Criminal 301. We find nothing in the record which indicates that the facts with regard to these arrests or the publications in the newspaper reached the jury. Learned counsel are not unaware of the proper method by which such matters may be placed in the record. Matters of this kind are very much in the discretion of the trial judge. If this were not so, trials in hotly contested criminal cases would rarely be final. We hold on this record we would not be justified in reversing the judgment for any of these reasons.

VI

It is also contended the court unreasonably restricted the cross-examination of Ollie Kelly and Pecoraro, witnesses for defendants. The witnesses had testified that Radaha was not in the polling place after it was closed. The state on rebuttal produced as a witness Isaacson, a court reportter, who took the evidence given by them before the Grand Jury when these witnesses had testified that Radaha was present in the polling place. Defendants objected to this testimony on the ground that they had not seen a transcript of the

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evidence. They asked reasonable time to examine it, which was denied. Defendants say they could not cross-examine the witnesses properly without the transcript and cite a number of cases, such as Casteel v. Millison, 41 Ill. App. 61, 65; Harman v. Illinois Coal Co., 237 Ill. 36, 39, and People v. Borella, 362 Ill. 218, 222, that this was error. We hold there is no merit in this contention. Defendants knew these witnesses had appeared before the Grand Jury. They could have applied to the court forna transcript of any testimony which they thought was important. They did not do so. In Cannon v. People, 141 Ill. 270, the defendant argued error in that the court refused to require the State's Attorney to furnish the defendants' counsel with minutes of the testimony taken before the Grand Jury. The Supreme Court said that it had not been referred to any authority sustaining such a practice and the practice in this state had been uniformly the reverse, and said there was no error. In the recent case of People v. Fedele, 366 Ill. 618, which was a prosecution for conspiracy to commit criminal acts at a primary election, it was held it was not error to refuse to issue a subpoena duces tecum for the production of a transcript of the testimony of a witness which had been given in another court: that the transcript was not of a public nature and could have been obtained from the reporter in the same manner as the People had obtained it, and that the court had no duty to compel the State's Attorney to surrender his copy to assist counsel for defendants in making out their case. The court cited Walker v. Struthers, 273 Ill. 387, and distinguished People v. Gerold, 265 Ill. 448, as well as People v. Borella, 362 Ill. 218, 222, upon which the defendants here rely. In the Borella case it appeared that the State's Attorney on cross-examination of defendants appeared to be reading from a written statement purporting to have been made by the defendants. At the conclusion of the cross-examination counsel for defendants asked to see the paper in order that he might further examine defendants and explain matters that were claimed to be impeaching, and it was held error to deny that request.

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That was not the situation here, and we hold there was no error in this respect. Defendants point out that much was made of this impeaching evidence in the closing arguments of the State's Attorney. The arguments are not, however, preserved in the record. That it was persuasive evidence we can not doubt. However, it was in the record and the State's Attorney would have been negligent if he had not called it to the attention of the jury.

VII

The controlling question in this case is raised by the contention of defendant that the court erred in receiving the ballots in evidence. Defendants say: "The burden rests definitely upon the People to prove beyond a reasonable doubt not only that no person did actually tamper with the ballots after they had been sealed, but also that during the time the ballots were in possesion of the Election Commissioners there was no reasonable opportunity for any person to tamper with them." In support of this contention two election contest cases are cited in the original brief; Alexander v. Shaw, 344 Ill. 389, 393, and Anderson v. Wierschem, 373 Ill. 239,241. Defendants say if such be the rule in a civil matter, much more should it be the rule applicable to a criminal case like this, where the liberty of men is involved. Defendants say it can hardly be urged that the State having the burden of proof can be said "to have proved beyond a reasonable doubt that there was no reasonable opportunity for any person to tamper with these ballots".

The evidence shows the ballots were placed in the boxes after the counting was finished and the boxes were sealed. The polls were closed at 5 P. M. The boxes were returned to the Election Commissioners office between 6 and 7 o'clock P. M. of the same day. These ballot boxes were taken from there by employees of the Election Commissioners to a warehouse in the possession of the Election Commissioners, where they were stored. They were sorted out by the employees and put in vaults

That was not the situation here, and we hold there was no error in this respect. Defendants point out that much was made of this incomplete evidence in the closing arguments of the State's attorney. The arguments are not, however, preserved in the record. That it was persuasive evidence we can not doubt. However, it was in the record and the State's Attorney would have been negligent if he had not called it to the attention of the jury.

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there. All the boxes from the 65 precincts of the 42nd ward were so sorted and placed, including the boxes from this 15th precinct. The ballots and the boxes were taken by employees of the Election Commissioners to the Grand Jury and there examined. Prior to that time employees of the Election Commissioners, Keil and Grzech, opened the boxes and made a recount of the ballots by direction of the County Judge on December 12, 1939. Also, Katharine Keeler, an examiner and photographer of questioned documents, examined the ballots in the presence of William Korsland, an employee of the Election Commissioners. It is not argued by defendants that these or any other particular persons changed or tampered with the ballots. There was evidence of witnesses (the weight of which was, of course, for the jury) to the effect that the ballots had been marked before the count was going on at the polls by several of these defendants. This evidence was positive in its nature. The ballots have been produced for our inspection and corroborate almost to a certainty the testimony of these witnesses for the State. The recount showed one candidate had been given 58 more votes than he was entitled to receive, his opponent 37 less votes than should have been counted for him. The total ballots cast in the precinct were 470. Similar results were noted as to other candidates on the respective tickets.

Mrs. Keeler testified (and her testimony is not contradicted) that numerous ballots show indentations which she compared and found the same must have been made while the ballots were piled one upon top of the other. She also found the corresponding embossing which would occur in such a case. 77 ballots bore cross marks by no less than two different persons and some of these by as many as three different persons. 32 of the 77 ballots bore cross marks that were matched by indentations on other ballots. 53 had cross marks in the Democratic circle which in her opinion had been made by one and the same person. 8 of the 77 besides the 53 bore cross marks in the Democratic circle in her opinion made by one person. 5 or 6, 6 altogether, one from the group of 8 just mentioned

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and 5 outside the group of 8, making a total of 6, bore cross marks in the Third Party circle, which in her opinion were made by one person. There was a miscellaneous group of 11 ballots, 2 of which in her opinion bore cross marks by two different persons.

Witnesses testified positively they saw Radaha, Monforti and Marsala marking the ballots just before they were counted. The condition of the ballots corroborates this testimony. nIt is clear no one of the defendants who was a judge of election could have been ignorant of what was going on. We hold the proof establishes the conspiracy alleged in the indictment beyond a reasonable doubt. People v. Amore, 293 Ill. App. 505, affirmed 369 Ill. 245.

VIII

On oral argument our attention was called to the recent case of People ex rel. Rusch v. Ferro, 313 Ill. App. 202, where a conviction in the County Court for contempt against certain election officials was reversed for the reason, as stated, that the proof did not show "that the ballots were preserved in such manner as to establish their integrity as evidence". Without reviewing that lengthy record in detail it is sufficient to say that themproceeding there was not in the strict sense a criminal case but for centempt under the Statute.

In People v. Newsome, 291 Ill. 11, Newsome was tried and convicted for fraud committed at an election. The fraud in part consisted of altering ballots and was of the same general nature as the offense for which defendants were tried. It was urged in the Supreme Court that the ballots had not been preserved properly and that none of them had been identified by witnesses. The Supreme Court (speaking through Mr. Justice Carter) said:

> "Whatever may be the rule as to the competency of ballots in cases of election contests, such rule does not apply to the competency of ballots in a criminal prosecution of this character. They were admissible in evidence, together with evidence of the manner in which they had been preserved, for what they were worth, and it was for the jury to determine what weight should be given to them as evidence under all the circumstances of the case."

We hold the trial court did not err in permitting the ballots

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> "Whatever may be the rule as to the competency of ballots in cases of election contests, such rule does not apply to the competency of ballots in a criminal prosecution of this character. They were admissible in evidence, together with evidence of the manner in which they had been preserved, for what they were worth, and it was for the jury to determine what weight should be given to them as evidence under all the circumstances of the case."

We hold the trial court did not err in permitting the ballots

to be received in evidence.

With the ballots in evidence we hold that there can be no reasonable doubt of the guilt of Harrison, McCoy, Radaha, Monforti and Marsala.

IX

However, there is a somewhat different situation as to defendant Frank Tornabene. As already stated, Tornabene was the Democratic clerk and Ada Stevens the Republican clerk. Ada Stevens became ill before the count was completed and after conferring with the Election Commissioners McCoy took up and completed her work. Tornabene was a young man about 23 years of age, married and employed as an inspector, timekeeper and order packer for Colonial Premier Lamp & Shade Company. He had been so employed for about seven years. He was not accustomed to participating in politics. His income was only about $7.50 a week, and he had no other financial resources. He applied for an appointment as election judge for the sole purpose of adding a bit to this small income. He applied for an appointment as judge instead of clerk, but he received the appointment to the clerkship and accepted it. He appeared at the polling place about 10 minutes before 6 o'clock on the morning of the election. It is not claimed that during the day there was any misbehavior in so far as his duties were concerned, and watchers from the Election Commissioners office were present. When the polls closed at 5 o'clock it was suggested they should eat before counting the ballots. He went with others to a place in the back room where the election was held where sandwiches were made and sold. He got some sandwiches and ate them. He afterwards went to the toilet room. He had nothing to do with sorting out the ballots. He did not touch the ballots during the entire evening. His entire duties consisted in tallying as the judge called off the returns. He did not see the ballots as they were tallied. Watchers were looking over his back to observe the tally he made, and no one has made any complaint or

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With the ballots in evidence we hold that there can be no reasonable doubt of the guilt of Harrison, Lofty, Madsen, Murphy and Marsala.

IX

However, there is a somewhat different situation as to defendant Frank Tornabene. As already stated, Tornabene was the Democratic clerk and Ada Stevens the Republican clerk. Ada Stevens became ill before the count was completed and after conferring with the Election Commissioners Lofty took up and completed her work. Tornabene was a young man about 23 years of age, married and employed as an inspector, timekeeper and order packer for Colonial Furniture Lamp Shade Company. He had been so employed for about seven years. He was not accustomed to participating in politics. His income was only about $7.50 a week, and he had no other financial resources. He applied for an appointment as election judge for the sole purpose of adding a bit to this small income. He applied for an appointment as judge instead of clerk, but he received the appointment to the clerkship and accepted it. He appeared at the polling place about 10 minutes before 6 o'clock on the morning of the election. It is not claimed that during the day there was any misbehavior in so far as his duties were concerned, and watchers from the Election Commissioners office were present. When the polls closed at 6 o'clock it was suggested they should set before counting the ballots. He went with others to a place in the back room where the election was held where sandwiches were made and sold. He got some sandwiches and ate them. He afterwards went to the toilet room. He had nothing to do with sorting out the ballots. He did not touch the ballots during the entire evening. His entire duties consisted in tallying as the judge called off the returns. He did not see the ballots as they were tallied. Watchers were looking over his back to observe the tally he made, and no one has made any complaint or

testified to any misconduct. When the count was over he went with the other officials to the office of the Election Commissioners. He testifies positively that he did not see the short penciling of the ballots, and there is no positive evidence in the record that he did see it. He lived next door to Monforti, whom he had known for many years. He gave Monforti's name as a reference when he applied for his appointment with the Election Commissioners. From an examination of the evidence bearing upon his conduct we are persuaded that there is certainly reasonable doubt of intentional wrongdoing and guilt under the law in so far as he is concerned.

X

It is insisted the court erred in refusing to give essential and proper instructions tendered by the defendants. We do not deem it necessary to discuss these alleged errors at length. Refused instruction No. 1 was argumentative in its nature. Refused instruction No. 2 on the question of presumption of innocence was fully covered by instruction No. 12 given on behalf of the People and by instruction No. 18 given in behalf of defendants.

XI

Finally, it is said in behalf of defendants that the punishment inflicted upon them is cruel and unusual. It is argued that their punishment is too severe. The punishment imposed is not light and it is apparent that the jury did not regard the conduct of the defendants as a light matter. Neither can we so regard it. To wilfully and intentionally deprive citizens of the right to have their ballots counted as cast is a most heinous offense. A jury found defendants guilty and a judge, who saw defendants and heard their testimony and listened to all their lawyers had to say in their behalf, has

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II

Finally, it is said in behalf of defendants that the punishment inflicted upon them is cruel and unusual. It is argued that their punishment is too severe. The punishment imposed is not light and it is apparent that the jury did not regard the conduct of the defendants as a light matter. Neither can we so regard it. To wilfully and intentionally deprive citizens of the right to have their ballots counted as cast is a most heinous offense. A jury found defendants guilty and a judge, who saw defendants and heard their testimony and listened to all their lawyers had to say in their behalf, has

approved the verdict. We cannot disapprove under the laws and the facts. People v. Amore, 369 Ill. 245. The judgment aginst Frank Tornabene will be reversed and the cause as to him remanded. As to the other defendants, the judgment will be affirmed.

AFFIRMED AS TO DEFENDANTS HARRISON, McCOY, RADAHA, MONFORTI, and MARSALA; REVERSED AND REMANDED AS TO DEFENDANT FRANK TORNABENE.

O'Connor and McSurely, JJ., concur.

approved the verdict. We cannot disapprove under the law and the facts. People v. Amore, 389 Ill. 246.

The judgment against Frank Torsiano will be reversed and the cause as to him remanded. As to the other defendants, the judgment will be affirmed.

AFFIRMED AS TO DEFENDANTS HUMBERT, GODLY, RAPURA, SCIRICI, and GERALA; REVERSED AND REMANDED AS TO DEFENDANT FRANK TORSIANO.

O'Connor and Kerner, JJ., concur.

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PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM F. THUMM, and GOTTLIEB THUMM, Appellees, v. VILLAGE OF LINCOLNWOOD, et al., Appellants	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

317 I.A. 460

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Thumms (William and Gottlieb) were the owners of a one-half interest in two certain condemnation judgments obtained against the Village of Lincolnwood for certain real property taken by the Village under the Local Improvement Act. One of these judgments was entered July 21, 1930, the other September 13, 1932. Gottlieb Thumm, at the time when the judgments were entered and now, is the owner and holder of a mortgage on the undivided one-half interest in the property taken for the judgments. William holds the title in this one-half subject to the mortgage. One parcel of the property was taken for the improvement of Tuohy Avenue, the other for the improvement of Lincoln Avenue. The judgments remaining in force and unpaid on October 13, 1939, plaintiffs filed their petition for mandamus to compel the City to pay them. The defenses interposed were, first, that the judgments had been paid by off-setting the amounts due on the same by unpaid assessments for benefits to the respective parcels of land by reason of the improvements made, and leaving a balance due to the defendant Village on the assessments of $6,013.00; secondly, that the Village, a municipal corporation, had no funds on hand out of which the judgments might be paid.

As to the first defense defendants relied on Section 16 of the Local Improvement Act (Ill. Rev. Stat., 1939, Chap. 24, par. 715).

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ELDIA E. THUMA,

and

COTTLINE THUMA,

Appellees,

v.

VILLAGE OF LINCOLNWOOD, et al.,
Appellants

MR. PRESIDING JUSTICE ALTGELD DELIVERED THE OPINION OF THE COURT:

The Thumas (William and Cottline) were the owners of a one-half interest in two certain condemnation judgments obtained against the Village of Lincolnwood for certain real property taken by the Village under the Local Improvement Act. One of these judgments was entered July 21, 1930, the other September 15, 1932. Cottline Thuma, at the time when the judgments were entered and now, is the owner and holder of a mortgage on the undivided one-half interest in the property taken for the judgments. William holds the title in the one-half subject to the mortgage. One parcel of the property was taken for the improvement of Touhy Avenue, the other for the improvement of Lincoln Avenue. The judgments remaining in force and unpaid on October 15, 1939, plaintiffs filed their petition for mandamus to compel the City to pay them. The defenses interposed were, first, that the judgments had been paid by off-setting the amounts due on the same by unpaid assessments for benefits to the respective parcels of land by reason of the improvements made, and leaving a balance due to the defendant Village on the assessments of $6,012.00; secondly, that the Village, a municipal corporation, had no funds on hand out of which the judgments might be paid.

As to the first defense defendants relied on Section 16 of the Local Improvement Act (Ill. Rev. Stat., 1939, Chap. 24, par. 716).

The cause was heard upon the stipulation of facts and evidence taken in open court. On June 16, 1941, it was ordered that the writ of mandamus issue. March 18, 1942, defendant filed its petition for leave to appeal, stating that it had not been culpably negligent in not filing its notice at an earlier date because a case was then pending in the Supreme Court of Illinois involving certain questions involved in this case, namely Cohen v. City of Chicago, 377 Ill. 221. Leave was granted. The decision in the Cohen case renders untenable the defense of set-off interposed by defendant here, the court in that case holding that such a construction of Section 16 would amount to an infringement of Section 13 of Article 2 of the State Constitution, which provides that private property shall not be taken or damaged for public use without just compensation. We now understand that defendant does not contend that the defense was valid.

It is, however, further contended for reversal that it does not appear from the evidence necessary funds are on hand or otherwise under control of defendant with which the judgments might be satisfied. Defendants cite Board of Supervisors v. Highway Commissioners, 222 Ill. 9, and DeWolfe v. Howley, 355 Ill.530. The defendants argue earnestly that as the petitioner alleged the Village had funds with which it could pay the judgments that it was encumbent on plaintiffs in the first instance to prove this allegation. The decisions of the Supreme Court do not sustain this contention. Lack of money wherewith to pay has been held in numerous cases to be an affirmative defense, and it is necessary that the defendant municipality in such case set forth in detail by its answer and support by proof facts showing that the payment of the judgment would require the use of funds essential to meet the current and necessary operating expenses of the municipality. Of many cases we cite only a few, People ex rel, Wanless v. City of Chicago, 378 Ill. 453; Cohen v. City of Chicago, 377 Ill. 221;

The cause was heard upon the stipulation of facts and evidence taken in open court. On June 16, 1941, it was ordered that the writ of mandamus issue. March 18, 1942, defendant filed its petition for leave to appeal, stating that it had not been authorized employed in not giving its notice at an earlier date because a case was then pending in the Supreme Court of Illinois involving a similar question involved in this case, namely Cohen v. City of Chicago, 377 Ill. 523. Leave was granted.

The decision in the Cohen case renders untenable the defense of set-off interposed by defendant here, the court in that case holding that such a construction of section 15 would amount to an infringement of Section 15 of Article 2 of the State Constitution, which provides that private property shall not be taken or damaged for public use without just compensation. We now understand that defendant does not contend that the defense was valid.

It is, however, further contended for reversal that it does not appear from the evidence necessary funds are on hand or otherwise under control of defendant with which the judgments might be satisfied. Defendants cite Board of Supervisors v. Highway Commissioners, 112 Ill. 9, and Dwight v. Hurley, 326 Ill.330. The principles upon which that as the petitioner alleged the village had funds with which it could pay the judgments that it was dependent on plaintiffs in the first instance to prove this allegation. The decisions of the Supreme Court do not sustain this contention. Lack of money or funds to pay has been held in numerous cases to be an affirmative defense, and it is necessary that the defendant municipality in such case set forth in detail by its answer and support by proof facts showing that the payment of the judgment would require the use of funds essential to meet the current and necessary operating expenses of the municipality. In many cases we cite only a few, People ex rel. Wallace v. City of Chicago, 278 Ill. 442; Cohen v. City of Chicago, 377 Ill. 523;

People ex rel. Bunge v. Downers Grove San. Dist., 281 Ill. App. 426, 429; and People ex rel, Seifried v. City of Chicago, 378 Ill. 479.

The defendant argues that since there was no replication to its plea of lack of funds it was necessary for plaintiff to make proof. It was not necessary. The knowledge of the material facts was in possession of defendant and the burden on it to prove these facts. Williams v. People 121 Ill. 84, 90; Belding v. Belding, 358 Ill. 216.

Defendant further contends that the order of June 16, 1941, is defective because, as it is said, it does not find and make certain the exact sum of money due and owing. The order is not defective in this respect. It finds the amount of the respective judgments, directs payment thereon with interest at five per cent to the date of payment, which is a matter of mere computation. It directs this payment to be made "less all liens, taxes, and encumbrances" standing against the property on July 21, 1930. The determination of these also was a mere matter of computation and no objection was made by defendants on this ground when the decree was entered.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

3.

People ex rel. Bunge v. Dempsey (1 Ill. App. 2d), 118 N.E. (2d), 349; and People ex rel. Bilfried v. City of Chicago, 375 Ill. 47.

The defendant argues that since there was no variation in the plan of land of trade it was necessary for plaintiff to make proof. It was not necessary. The knowledge of the material facts was in possession of defendant and the burden on it to prove these facts. Williams v. People 123 Ill. 84, 90; Bilbine v. Grigsby, 328 Ill. 416.

Defendant further contends that the order of June 18, 1941, is defective because, as it is said, it does not find and state certain the exact sum of money due and owing. The order is not defective in this respect. It finds the amount of the respective judgments, direct payment thereon with interest at five per cent to the date of payment, which is a matter of mere computation. It directs this payment to be made "less all liens, taxes, and encumbrances" existing against the property on July 21, 1930. The determination of these also was a mere matter of computation and no objection was made by defendants on this ground when the decree was entered.

The judgment is affirmed.

AFFIRMED.

O'Connor and McGuire, JJ., concur.

42261

VIVIAN KAPLAN, Appellee,	APPEAL FROM
v.	SUPERIOR COURT,
ANTON KAPLAN, Appellant.	COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant husband from a decree of divorce entered against him in favor of his wife, Vivian, on a charge of extreme and repeated cruelty. The decree also awarded to the wife the sum of $1,000.00 for her solicitor's fees. The bill was filed October 7, 1939. Defendant answered, denying the charges of cruelty, and filed a counterclaim in which he charged the plaintiff had deserted him without cause on the 20th of February, 1938. Upon the trial he did not claim the allegations of the counterclaim had been proved and asked leave to dismiss it which was denied. It is contended for reversal that the charges of cruelty are not sustained by the evidence and that the allowance of $1,000.00 for solicitor's fees is excessive and not supported by the evidence.

Uncontradicted facts in evidence are that these parties were married at Chicago, Illinois, on June 25, 1933; that they thereafter lived together as husband and wife until the 20th of February, 1938, when the wife left, claiming it was dangerous for her to longer live with her husband. No child or children have been born of the marriage.

Plaintiff testifies to two specific instances of claimed cruelty. The first was on February 6, 1938, when in an altercation about financial matters she says defendant slapped her. On February 20, 1938, when after a somewhat similar altercation, she testifies that he threw a saucer which struck and injured her. She also testifies that he often became angry at her and would push her around and to a

42251

VIVIAN KAPLAN,
Appellee,

v.

ANTON KAPLAN,
Appellant.

MR. PRESIDING JUSTICE ALDRICH DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant husband from a decree of divorce entered against him in favor of his wife, Vivian, on a charge of extreme and repeated cruelty. The decree also awarded to the wife the sum of $1,000.00 for her solicitor's fees. The bill was filed October 7, 1938. Defendant answer red, denying the charges of cruelty, and filed a counterclaim in which he charged the plaintiff had deserted him without cause on the 20th of February, 1938. Upon the trial he did not plead the allegations of the counterclaim had been proved and asked leave to dismiss it which was denied. It is contended for reversal that the charges of cruelty are not sustained by the evidence and that the allowance of $1,000.00 for solicitor's fees is excessive and not supported by the evidence.

Uncontradicted facts in evidence are that these parties were married at Chicago, Illinois, on June 25, 1932; that they thereafter lived together as husband and wife until the 20th of February, 1938, when the wife left, claiming it was dangerous for her to longer live with her husband. No child or children have been born of the marriage.

Plaintiff testifies to two specific instances of claimed cruelty. The first was on February 5, 1938, when in an altercation about financial matters she says defendant slapped her. On February 20, 1938, when after a somewhat similar altercation, she testifies that he threw a saucer which struck and injured her. She also testifies that he often became angry at her and would push her around and to a

general line of conduct making it unsafe for her to,live with him. He denies such conduct.

Plaintiff conducted a small business of her own. Defendant was a frequenter of a stock broker establishment, where most of his time was spent in speculating on the market.

The evidence of plaintiff as to the incident of February 6, 1938, is corroborated by her sister, Frieda Levine, who testifies that on that date she went to visit the parties, found them together, that plaintiff was crying and stated in defendant's presence that he had struck her in the face. The incident of February 20, 1938, is corroborated by the testimony of Mrs. Ida Tobias, who says that on that date she visited the parties at their apartment and that as she entered she heard a commotion and saw a saucer flying, which struck plaintiff's shoulder.

Plaintiff's business is a corset establishment out of which she says she derives an income of $18.00 per week. She says that during her married life defendant never contributed to her support other than that he was accustomed to pay the rent, and she adds that "he kicked about paying it". Defendant is the owner of a building at 826 Wilson Avenue which, he testifies, is worth $8,000.00. Evidence for the plaintiff indicates that its fair market value is $10,000.00. The evidence also shows that defendant had a brokerage account in which there were stocks and other securities of a value of more than $10,000.00 in May, 1938, and of more than $12,000.00 in November, 1940. His sister, however, claims to be the owner of part of these stocks. Dividend checks were all payable to him.

The defendant testified denying all acts of cruelty. The trial judge evidently was of the opinion plaintiff was telling the truth. In the trial court it was, of course, necessary for plaintiff to establish her case by a preponderance of the evidence. The chancellor who saw and heard the witnesses having, however, found in favor of plaintiff, the question in this court is whether the findings of the decree are clearly and manifestly against the evidence, Moore v. Moore,

general line of conduct making it unsafe for her to live with him. He denies such conduct.

Plaintiff conducted a small business of her own. Defendant was a frequenter of a stock brokers establishment, where most of his time was spent in speculating on the market.

The evidence of plaintiff as to the incident of February 5, 1928, is corroborated by her sister, Frieda Levine, who testifies that on that date she went to visit the parties, found them together, that plaintiff was crying and stated in defendant's presence that he had struck her in the face. The incident of February 20, 1928, is corroborated by the testimony of Mrs. Ida Tobias, who says that on that date she visited the parties at their apartment and that as she entered she heard a commotion and saw a saucer flying, which struck plaintiff's shoulder.

Plaintiff's business is a correct establishment out of which she says she derives an income of $18.00 per week. She says that during her married life defendant never contributed to her support other than that he was accustomed to pay the rent, and she adds that "he kicked about paying it". Defendant is the owner of a building at 626 Fifth Avenue which, he testifies, is worth $8,000.00. Evidence for the plaintiff indicates that its fair market value is $10,000.00. The evidence also shows that defendant had a brokerage account in which there were stocks and other securities of a value of more than $10,000.00 in May, 1928, and of more than $12,000.00 in November, 1929. His sister, however, claims to be the owner of part of these stocks. Dividend checks were all payable to him.

The defendant testified denying all acts of cruelty. The trial judge evidently was of the opinion plaintiff was telling the truth. In the trial court it was, of course, necessary for plaintiff to establish her case by a preponderance of the evidence. The chancellor who saw and heard the witnesses having, however, found in favor of plaintiff, the question in this court is whether the findings of the decree are clearly and manifestly against the evidence. Moore v. Moore,

335 Ill. 517; Arliskas v. Arliskas, 343 Ill. 112; Durbin v. Durbin, 315 Ill. App. 238, 243.

In an attempt to corroborate the testimony of the defendant a number of physicians were called, some of whom had treated him for arthritis, a disease from which the evidence shows without question he is a sufferer. These physicians gave expert evidence tending to show that in the physical condition defendant was at the time of these alleged acts of cruelty, he could not have been guilty of the acts of violence complained of. Plaintiff gave testimony tending to show defendant was able to drive an automobile and that he was also able to throw a ball notwithstanding his infirmities. The chancellor was in a much better position to decide these questions of fact than are we. Upon the whole it is evident the trial judge was satisfied the defendant by his conduct gave plaintiff reason to fear him. He was a man of violent temper and quarrelsome disposition. While the question is not without difficulty, we are not able to say after a careful perusal of all the testimony that the findings of the decree as to acts of physical violence and general conduct are clearly and manifestly against the weight of the evidence. Moore v. Moore, 335 Ill. 517; Arliskas v. Arliskas, 343 Ill. 112.

The question of the amount of solicitor's fees which should have been allowed is also one not easy to decide. No expert evidence was offered as to the value of these fees, but we doubt much whether such expert evidence would have been substantial value to the trial court or this court. The solicitor for the plaintiff, at the suggestion of the court, filed a verified statement of the time he had spent and the services he had rendered to plaintiff in the preparation and trial of the cause. The items for which charge was made begin with October, 1939, and end with November 18, 1941. It shows that 65 hours in all were taken up in preparation and trial of the case and other necessary services for plaintiff in connection with it. When it was presented the record shows the following colloquy:

356 Ill. 317; Williams v. Williams, 343 Ill. 112; Durbin v. Durbin, 315 Ill. App. 238, 242.

In an attempt to corroborate the testimony of the defendant a number of physicians were called, some of whom had treated him for arthritis, a disease from which the evidence shows without question he is a sufferer. These physicians gave expert evidence tending to show that in the physical condition defendant was at the time of the alleged acts of cruelty, he could not have been guilty of the acts of violence complained of. Plaintiff gave testimony tending to show defendant was able to drive an automobile and that he was also able to throw a ball notwithstanding his infirmities. The chancellor was in a much better position to decide these questions of fact than are we. Upon the whole it is evident the trial judge was satisfied the defendant by his conduct gave plaintiff reason to fear him. He was a man of violent temper and quarrelsome disposition. While the question is not without difficulty, we are not able to say after a careful perusal of all the testimony that the findings of the decree as to acts of physical violence and general conduct are clearly and manifestly against the weight of the evidence. Moore v. Moore, 356 Ill. 317; Williams v. Williams, 343 Ill. 112.

The question of the amount of solicitor's fees which should have been allowed is also one not easy to decide. No expert evidence was offered as to the value of these fees, but we doubt much whether such expert evidence would have been substantial value to the trial court or this court. The solicitor for the plaintiff, at the suggestion of the court, filed a verified statement of the time he had spent and the services he had rendered to plaintiff in the preparation and trial of the cause. The items for which charge was made begin with October, 1939, and end with November 15, 1941. It shows that 60 hours in all were taken up in preparation and trial of the case and other necessary services for plaintiff in connection with it. Then it was presented the record shows the following colloquy:

"Mr. Falk: *** Another thing, Judge, I have prepared a statement showing what services I have rendered. It is a detailed statement. I have shown it to Counsel. It is stipulated that if I were to testify, that is what I would testify to.

"The Court: You have the amount?

"Mr. Falk: A detailed showing of the number of hours, etc. I would like to have this marked.

"The Court: As to the reasonableness of the fees---

"Mr. Falk: I haven't expressed an opinion.

"Mr. Cantwell: If Counsel says he put in that much time, it is perfectly all right.

"Mr. Falk: You will find it to be very fair, almost to the minute.

"The Court: All right."

Prior to this colloquy defendant's attorney had filed an affidavit in which he stated plaintiff was not entitled to recover solicitor's fees at all because of his physical condition and because plaintiff was able to pay her own solicitor. Apparently no point was made in the trial court that the amount of solicitor's fees allowed by the decree was unreasonable. Independently of testimony courts have knowledge of what is a reasonable fee in a case of this kind. The record is before us and consists of about 400 pages. The time necessarily spent has already been noted. The real question for us to decide is whether the sum allowed is an abuse of discretion. Here, again, the trial court had advantages we do not possess, and we are not able to say on this record that the court abused its discretion. Byerly v. Byerly, 363 Ill. 517. No alimony was allowed, and apparently the trial court took this into consideration in adjudging fees to be paid.

The decree will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

"Mr. Falk: "Another thing, judge, I have prepared a statement showing such services I have rendered. It is a detailed statement. I have shown it to counsel. It is estimated that if I were to testify, that is what I would testify to.

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"The Court: As to the reasonableness of the fee---

"Mr. Falk: I haven't expressed an opinion.

"Mr. Cantwell: If counsel says he got in that much time, it is perfectly all right.

"Mr. Falk: You will find it to be very fair, almost to the minute.

"The Court: All right."

Prior to this colloquy defendant's attorney had filed an affidavit in which he stated plaintiff was not entitled to recover solicitor's fees at all because of his physical condition and because plaintiff was able to pay her own solicitor. Apparently no finding was made in the trial court that the amount of solicitor's fees claimed by the decree was unreasonable. Independently of testimony courts have knowledge of what is a reasonable fee in a case of this kind. The record is before us and consists of about 400 pages. The time necessarily spent has already been noted. The real question for us to decide is whether the sum allowed is an abuse of discretion. Even, again, the trial court had advantages we do not possess, and we are not able to say on this record that the court exceed its discretion. Byerly v. Byerly, 388 Ill. 217. No alimony was allowed, and apparently the trial court took this into consideration in adjudging fees to be paid.

The decree will be affirmed.

Affirmed.

O'Connor and McSurely, JJ., concur.

42271

317 I.A. 461

FARNSWORTH, INCORPORATED, a Corporation, Appellant,	APPEAL FROM
v.	MUNICIPAL COURT
LIEDERMAN MANUFACTURING COMPANY, a Corporation, Appellee.	OF CHICAGO.

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MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover $551.11, being the purchase price of artificial leather binding goods sold by plaintiff to defendant. There was a jury trial, and a verdict rendered in defendant's favor. Plaintiff's motion for a new trial was overruled, judgment was entered on the verdict and plaintiff appeals.

Plaintiff in its statement of claim, alleged that December 28, 1936, defendant placed an order for merchandise with plaintiff to be delivered as defendant requested; that December 2, 1937, plaintiff delivered to the New York, New Haven and Hartford Railroad Company, the merchandise involved, consigned to plaintiff. The items and prices of the merchandise are set forth in detail, aggregating $551.11. Defendant filed its affidavit of merits in which it averred that the merchandise was delivered to it in a damp, wet and spoiled condition, as a result of the negligence of plaintiff or its agent or agents and was wholly unfit for use. That upon receipt of the goods defendant immediately returned them to plaintiff. Interrogatories were filed by plaintiff and answers made by defendant. Afterward plaintiff filed a motion for a summary judgment supported by two affidavits. In one of them it was set up that December 28, 1936, plaintiff received a written order from defendant for certain merchandise; that May 5, 1937, it received another order to take the place of the previous one; that about July 29, 1937, plaintiff re-

FARNSWORTH, INCORPORATED, a Corporation, Appellant,	APPEAL FROM
v.	APPELLATE COURT,
LIEBERMAN MANUFACTURING COMPANY, a Corporation, Appellee.	OF CHICAGO.

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Plaintiff in its statement of claim, alleged that December 28, 1936, defendant placed an order for merchandise with plaintiff to be delivered as defendant requested; that December 3, 1937, plaintiff delivered to the New York, New Haven and Hartford Railroad Company, the merchandise involved, consigned to plaintiff. The items and prices of the merchandise are set forth in detail, aggregating $551.11. Defendant filed its affidavit of merits in which it averred that the merchandise was delivered to it in a damp, wet and spoiled condition, as a result of the negligence of plaintiff or its agent or agents and was wholly unfit for use. That upon receipt of the goods defendant immediately returned them to plaintiff. Interrogatories were filed by plaintiff and answers made by defendant. Afterward plaintiff filed a motion for a summary judgment supported by two affidavits. In one of them it was set up that December 28, 1936, plaintiff received a written order from defendant for certain merchandise; that May 3, 1937, it received another order to take the place of the previous one; that about July 29, 1937, plaintiff re-

received an order from defendant to ship certain of the merchandise and that such merchandise was shipped by plaintiff to defendant, "f. o. b. Lowell, Massachusetts" and the express charges were paid by defendant. That about September 20, 1938, the balance of the merchandise remaining undelivered under the order of May 5, 1937, was delivered to the Railroad Company by plaintiff and consigned to defendant at Chicago "f. o. b. Lowell, Massachusett." That about October 8, 1938, plaintiff received a letter from defendant stating that the merchandise had been entirely "soaked with water evidently due to flood" and the affidavit continued that all prior orders of merchandise had been shipped f. o. b. Lowell, Massachusetts, and the freight charges paid by defendant. There was now due $551.11. The other affidavit set up that the goods were in good condition when they were packed and delivered to the railroad at Lowell, Mass.

Defendant filed an affidavit in opposition to plaintiff's motion for summary judgment denying that the goods were shipped f. o. b. Lowell, Mass., and setting up that defendant had written a letter to plaintiff upon receipt of the merchandise involved, stating that the goods were soaked with water, evidently due to flood, and that the condition of the goods was due to the negligence of plaintiff or its agent or agents and as there was a question of fact, the court properly denied the motion for summary judgment.

Several months thereafter, the case was called for trial, a jury impennelled and plaintiff was given leave to withdraw a juror to file an amended statement of claim. The amended statement was afterward filed in which it was averred, among other things, that the goods involved were delivered September 20,1938, to the railroad by plaintiff at Lowell, for shipment to defendant in Chicago. (It will be noted that plaintiff in its original statement of claim said the goods involved in the suit were delivered to the railroad December 2, 1937,

received an order from defendant to ship certain of the merchandise and that such merchandise was shipped by plaintiff to defendant, "f. o. b. Lowell, Massachusetts" and the express charges were paid by defendant. That about September 20, 1928, the balance of the merchandise remaining undelivered under the order of July 5, 1927, was delivered to the Railroad Company by plaintiff and consigned to defendant at Chicago "f. o. b. Lowell, Massachusetts." That about October 8, 1928, plaintiff received a letter from defendant stating that the merchandise had been entirely "soaked with water evidently due to flood" and the affidavit continued that all prior orders of merchandise had been shipped f. o. b. Lowell, Massachusetts, and the freight charges paid by defendant. There was now due $[illegible]. The other affidavit set up that the goods were in good condition when they were packed and delivered to the railroad at Lowell, Mass.

Defendant filed an affidavit in opposition to plaintiff's motion for summary judgment denying that the goods were shipped f. o. b. Lowell, Mass., and setting up that defendant had written a letter to plaintiff upon receipt of the merchandise involved, stating that the goods were soaked with water, evidently due to flood, and that the condition of the goods was due to the negligence of plaintiff or its agents or agents and as there was a question of fact, the court properly denied the motion for summary judgment.

Several months thereafter, the case was called for trial, a jury impannelled and plaintiff was given leave to withdraw a juror to file an amended statement of claim. The amended statement was afterward filed in which it was averred, among other things, that the goods involved were delivered September 20, 1928, to the railroad by plaintiff at Lowell, for shipment to defendant in Chicago. (It will be noted that plaintiff in its original statement of claim said the goods involved in the suit were delivered to the railroad December 5, 1927,

and not September 20, 1938, as alleged in the amended statement of claim.) There is no allegation in either the original or amended statement of claim that the goods were delivered f. o. b., Lowell, Mass.

Defendant filed its verified defense to the amended statement of claim in which for the first time it was averred that it was "orally understood and agreed" between the president of the plaintiff and the president of the defendant companies that the merchandise covered by the contract was to be delivered to defendant "on approval," with the understanding that defendant had the privilege of returning any of the merchandise found by it to be "not in a merchantable condition or suitable for fabrication." That defendant was obliged to pay the freight charges before receiving the packages containing the goods and immediately thereafter, when such packages were opened and the merchandise found to be in a bad condition and not fit for use, defendant returned such merchandise to plaintiff.

There were also interrogatories filed and answers made after the amended pleadings were filed.

Plaintiff contends that the verdict is against the manifest weight of the evidence and that it and the judgment should be set aside and the cause remanded for a new trial. In support of this counsel for plaintiff calls attention to the fact that defendant's original affidavit of merits sets up that the merchandise was wet and spoiled as a result of the negligence of plaintiff or its agents. And that the affidavit filed by defendant in opposition to the motion for summary judgment states that one of the issues raised on plaintiff's motion for a summary judgment was one of fact as to whether the merchandise was in a damaged condition at the time of its packing by plaintiff. And it was not until defendant filed its affidavit of defense to plaintiff's amended statement of claim that defendant for the first

and not September 20, 1938, as alleged in the amended statement of claim.) There is no allegation in either the original or amended statement of claim that the goods were delivered f. o. b., Lowell, Mass.

Defendant filed its verified defense to the amended statement of claim in which for the first time it was averred that it was "orally understood and agreed" between the president of the plaintiff and the president of the defendant company that the merchandise covered by the contract was to be delivered to defendant "on approval," with the understanding that defendant had the privilege of returning any of the merchandise found by it to be "not in a merchantable condition or suitable for fabrication." That defendant was obliged to pay the freight charges before receiving the packages containing the goods and immediately thereafter, when such packages were opened and the merchandise found to be in a bad condition and not fit for use, defendant returned such merchandise to plaintiff.

There were also interrogatories filed and answers made after the amended pleadings were filed.

Plaintiff contends that the verdict is against the weight of the evidence and that it and the judgment should be set aside and the cause remanded for a new trial. In support of this contention for plaintiff calls attention to the fact that defendant's original affidavit of merits sets up that the merchandise was wet and spoiled as a result of the negligence of plaintiff or its agents. And that the affidavit filed by defendant in opposition to the motion for summary judgment states that one of the issues raised on plaintiff's motion for a summary judgment was one of fact as to whether the merchandise was in a damaged condition at the time of its packing by plaintiff. And it was not until defendant filed its affidavit of defense to plaintiff's amended statement of claim that defendant for the first

time said the goods were sold "on approval." Counsel for plaintiff also point out other matters which they contend show that the testimony offered on the trial on behalf of defendant is unworthy of belief and we think there is considerable merit in this contention. But upon a consideration of all the evidence in the record, we are of opinion that from the manner in which the parties did business it appears neither of them had in mind the rule of law which they referred to as "f. o. b. Lowell" or "not f. o. b. Lowell." Nor did they have in mind the technical rule of law by which the goods were sold "on approval." But all the evidence is to the effect that plaintiff shipped the goods to defendant at the times defendant ordered them and that when they were received, such as were not satisfactory were not accepted. The first time that the rule "f o. b. Lowell" was sought to be invoked or the defense made by defendant that the goods were sent "on approval" was at the trial of the case. There is no dispute that the goods were damaged by reason of being saturated with water due to a flood and that they were returned by defendant to plaintiff. This was the view taken by the jury, approved by the trial judge and we cannot say upon a review of the entire record, that the verdict should be set aside and the judgment reversed.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

time said the goods were sold "on approval." Counsel for plaintiff also point out other matters which they contend show that the testimony offered on the trial on behalf of defendant is unworthy of belief and we think there is considerable merit in this criticism. But upon a consideration of all the evidence in the record, we are of opinion that from the manner in which the parties did business it appears neither of them had in mind the rule of law ordinarily referred to as "f. o. b. Lowell" or "net f. o. b. Lowell," nor did they have in mind the technical rule of law by which the goods were sold "on approval." But all the evidence is to the effect that plaintiff shipped the goods to defendant at the time defendant ordered them and that when they were received, such as were not satisfactory were not accepted. The first time that the rule "f. o. b. Lowell" was sought to be invoked or the defense made by defendant that the goods were sent "on approval" was at the trial of the case. There is no dispute that the goods were damaged by reason of being saturated with water due to a flood and that they were returned by defendant to plaintiff. This was the view taken by the jury, approved by the trial judge and we cannot say upon a review of the entire record, that the verdict should be set aside and the judgment reversed.

The judgment of the municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Baldwin, P. J., and McSurely, J., concur.

42281

317 I.A. 462

MARY SMITH, Appellant,	APPEAL FROM
v.	CIRCUIT COURT,
CHICAGO MOTOR COACH COMPANY, an Illinois Corporation, Appellee.	COOK COUNTY.

155

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her on account of the alleged negligence of the driver of one of defendant's motor coaches. There was a jury trial, a verdict and judgment for defendant and plaintiff appeals.

The record discloses that about 7:25 on the morning of December 4, 1939, plaintiff, who lived on the South side of Chicago, was a passenger in one of defendant's motor coaches going to her place of employment. The coach driven in a northerly direction on Stockton Drive, a winding roadway running in a northerly direction in Lincoln Park, stopped at Dickens avenue, an east and west street, to permit passengers to alight.

Plaintiff's position, as stated by her counsel is that "As the bus neared Dickens Avenue, the door swung open before it came to a stop and the bus jerked suddenly causing the plaintiff to be thrown from the bus to the pavement," as a result of which she was injured. On the other hand, defendant's position is that the driver of the bus was signalled to stop; that he stopped the bus in the normal way and after plaintiff alighted she turned her ankle and fell.

Counsel for defendant in their brief make a number of contentions that the brief filed by counsel for plaintiff does not comply with Rule 7 of this court. There is no merit in these

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v.	
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contentions. Trust Co. of Chicago v. Iroquois Auto Ins. Underwriters, 285 Ill. App. 317; Pape v. Pareti, 315 Ill. App. 1-8; Stein v. Midway Chev. Co. 315 Ill. App. 105; Swain v. Hoberg, 380 Ill. 435.

Counsel for plaintiff contends (1) that the verdict is against the manifest weight of the evidence and (2) that the "conduct, attitude, remarks, and closing arguments of defendant's counsel were so prejudicial to plaintiff's rights as to require a new trial."

(1) Three witnesses called by plaintiff testified as to how the accident occurred and 4 other witnesses testified on behalf of defendant. John Griffin, called by plaintiff, testified that he was a passenger on the bus; that as it approached the intersection of Dickens avenue, plaintiff was standing in front of him at the door. "There was a sudden stop, the door flew open and out went Mrs. Smith. I got off and picked her up. The bus moved after the door opened." That he was not acquainted with Mrs. Smith. Agnes Johns testified that she was a passenger on the bus; that "Mrs. Smith got up to get off the bus. Driver stopped suddenly and she fell out. Driver went ten or fifteen feet before he stopped." That after the accident Mrs. Smith was put back in the bus and sat in the same seat with the witness: that she did not know Mrs. Smith and that she gave her her name and address The evidence further shows that plaintiff was taken some distance north where she received first aid from a doctor summoned by the driver of the bus.

Plaintiff testified that she was a passenger on the bus; that she was going to get off at Dickens Avenue. "The driver was going fast. I was standing at the door holding the rod. He overpassed the stop. He was going at such a speed he just dumped the door open and stopped suddenly. It threw me winding out of the bus. When I came to I was at the back wheel."

Louis Teller, called by defendant, testified that he was manager

contentions. First Co. of Chicago v. Ironwoin and Ins. Underwriters, 285 Ill. App. 317; Kemp v. Peretti, 318 Ill. App. 1-8; Quain v. Sidney Chev. Co. 318 Ill. App. 108; Ragin v. Harper, 360 Ill. App.

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of the Aragon Hotel and was a passenger on the bus in question. That he sat on the second seat from the front on the right hand side - the opposite side of the driver; that the bus stopped and when it didn't start up "I asked the driver why he didn't start. Suddenly the driver got off the bus and I saw a woman lying there. He picked her up and put her back in the bus," and took her on north to the Park Lane Hotel where the evidence shows she received the attention of a physician. The witness further testified that the coach stopped as usual; that a passenger got off "and then this woman" got off.

Percy Proctor, called by defendant, testified he was a chauffeur and a passenger on the bus in question. That "I was seated at the extreme right front before the front door of the coach," over the front wheel, reading his paper as the bus approached Dickens Avenue. That he did not notice any jerk of the bus when it stopped. The evidence shows that the driver passed cards to the passengers and the witness testified that he signed the card and gave it to the driver. Objection was made by counsel for plaintiff to the introduction of this card, which was overruled; the objection was wholly without merit.

James L. Chambers, the driver of the bus, testified that "As I approached Dickens Avenue, I had the signal to stop for letting a passenger off. I brought the coach to a stop and two ladies and a man got off. The second lady in getting off turned her ankle and fell." Pictures of the coach, or a similar one, were introduced in evidence by defendant but they are not in the record.

We think it clear that whether the door of the coach was open and plaintiff was thrown or fell out before the bus stopped, or whether she got off after it stopped andnturned her ankle, was a question for the jury. And upon a consideration of all the evidence in the record, we are clearly of opinion that we would not be warranted in disturbing the verdict of the jury on the ground that it is against the manifest weight

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of the evidence.

(2) In support of the contention that the conduct of counsel for defendant, in his closing argument, was so prejudicial as to warrant a new trial: counsel for defendant in his argument said: "The driver is operating this coach and to bring in a verdict in this case you have to saynthe driver was negligent in the operation of the coach, that he didn't do his job, and that I was negligent in preparing this case for trial for the people I represent here. I represent the bus company and we make our bread and butter working for them. You heard the testimony, and your verdict is going to say directly or indirectly whether the driver was negligent or whether I did a good job, but whether we.lose our jobs makes no difference to you." Other complaints are made to the argument but no objection was made by counsel for plaintiff. Complaint is also made that counsel for defendant asked plaintiff how she secured the services of her attorney in the case. Objection was made to this and sustained. Defendant's counsel then asked: "Q. Did the doctor refer you to this attorney?" This was objected to and the objection sustained.

We have considered other contentions made in this respect but think none of them warrant the conclusion that plaintiff's rights were prejudiced. The jurors are presumed to have the qualifications required by the statute. The issues were simple and easily understood and while we do not agree with everything that counsel for defendant said, we are of opinion that in view of the whole record we are unable to say that plaintiff did not receive a fair trial.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

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(2) In support of the contention that the conduct of counsel for defendant, in his closing argument, was so prejudicial as to warrant a new trial: counsel for defendant in his argument said: "The driver is operating this coach and to bring in a verdict in this case you have to say the driver was negligent in the operation of the coach, that he didn't do his job, and that I was negligent in preparing this case for trial for the people I represent here. I represent the bus company and we make our bread and butter working for them. You heard the testimony, and your verdict is going to say directly or indirectly whether the driver was negligent or whether I did a good job, but whether we lose our jobs makes no difference to you." Other complaints are made to the argument but no objection was made by counsel for plaintiff. Complaint is also made that counsel for defendant asked plaintiff how she secured the services of her attorney in the case. Objection was made to this and sustained. Defendant's counsel then asked: "Did the doctor refer you to this attorney?" This was objected to and the objection sustained.

We have considered other contentions made in this respect but think none of them warrant the conclusion that plaintiff's rights were prejudiced. The jurors are presumed to have the qualifications required by the statute. The issues were simple and easily understood and while we do not agree with everything that counsel for defendant said, we are of opinion that in view of the whole record we are unable to say that plaintiff did not receive a fair trial.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P.J., and Kerner, J., concur.

317 Ill App
Adv. pt. 4
4-1-43

GEN. NO. 9707 AGENDA NO. 22

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1942.

ELMIRA SWAIN, APPELLEE,	)	
vs.	:	APPEAL FROM THE CIRCUIT
WILLIAM HOBERG, APPELLANT.	)	COURT OF LaSALLE COUNTY.

HUFFMAN, P. J.

This action arises out of a collision between an automobile in which appellee was riding, being operated by Mabel Roseberry, and an automobile owned by appellant being operated by Alberta Pitzer, a cousin of appellant's wife, and in which car appellant's wife was riding. Appellee was injured as a result of said collision and instituted this suit against appellant to recover for the injuries sustained.

Upon the first trial, judgment was rendered upon a verdict for appellee. An appeal in that case resulted in the cause being reversed and remanded on the ground

No. 6707

IN THE APPELLATE DIVISION OF THE SUPREME
COURT OF SOUTH AFRICA,
(CAPE PROVINCIAL DIVISION).

ELSIE MARIA,	
[illegible],	
v.	
[illegible] NGANGA,	
APPELLANT.	

BETWEEN:

APPEAL FROM THE DISTRICT COURT OF [illegible].

BURTON, J.A.:

This action arises out of a collision between an automobile in which appellee was riding, being operated by [illegible], and an automobile owned by appellant being operated by Elsie Ziemer, a truck of appellant's and in which appellant's wife was riding. Damages are claimed in a joint of said soldiers and husband jointly and separately respectively for the injuries received.

Upon the first trial, judgment was rendered upon a verdict for appellee. An appeal in that case resulted in the case being reversed and remanded on the ground

that the evidence failed to establish agency between appellant and the driver of his car. (281 Ill. App. 203) Subsequently, the case came before this court upon appeal from a second judgment upon verdict for appellee (312 Ill. App. 610). In that instance, the appeal was dismissed. Leave to appeal was granted appellant by this court. Pursuant to that appeal, the Supreme Court has remanded the case to this court with directions to consider same on the merits. (380 Ill. 435)

Appellant denied that his car at the time in question was under his control or management, or being operated by any servant, agent or employee of his.

For the purpose of this opinion, we shall refer only to the testimony on behalf of appellee. Six witnesses testified for appellee. They were appellee, and Mabel Roseberry, with whom appellee was riding; Dr. Scanlon, who testified regarding appellee's injuries; Mr. Swain, husband of appellee; Mrs. Hoberg; and Alberta Pitzer. The first four witnesses offered no evidence regarding the question of agency. We find nothing in the testimony of Mrs. Hoberg or Mrs. Pitzer tending to prove agency between appellant and Mrs. Pitzer.

Mrs. Hoberg testifies that she called Mrs. Pitzer and asked her to take her to a party; that her husband did not know she was going to the party; that he did not

that the evidence failed to establish agency between appellant and the driver of the car. 1961 Ill. App. 203). Consequently, the case came before this court upon appeal from a second judgment upon verdict for appellee (26 Ill. App. 2d). In that instance, the appeal was dismissed. Leave to appeal was granted appellant by this court. Pursuant to that mandate, the Supreme Court has remanded our case to have court with directions to consider same on the merits. (20 Ill. 4d).

Appellant denied that his car at the time in question was under his control or management, or being operated by any servant, agent or employee of his.

For the purpose of this opinion, we shall refer only to the testimony on behalf of appellee. Six witnesses testified for appellee. Their were appellee, and about eyewitnesses, when were appellee was riding; Mr. Sexton, who testified regarding excessive speed; Mr. Swain, insured of appellee; Mrs. Conway; and Officer Ritter. The first four witnesses offered no evidence regarding the question of agency. We find nothing in the testimony of Mrs. Conway or Mr. Ritter tending to prove agency between appellant and Mr. Ritter.

Mrs. Conway testified that she called Mr. Ritter and asked her to take her to a party; that her husband did not know who was going to the party; that he did not

know she was going to use the car; that she acted upon her own free will; that the car belonged to her husband; that he never gave her any permission to use it and had no idea she was going to the party or expected to use the car.

Mrs. Pitzer states that when she was living in the Hoberg home in 1928 and 1929, on several occasions, she drove the Hoberg car upon appellant's suggestion, but that since said time, he had never said anything to her about using his car; that she did not have his permission or direction to drive the car, or to drive the same for his wife; that on the day in question, Mrs. Hoberg called her by telephone and asked her to drive her to the party; that so far as she knew, appellant had no knowledge she was driving his car; and that he never gave her any instructions to drive the same.

No useful purpose would be served by another trial. Appellee was unable to produce any evidence tending to prove agency at the former trial, and we find no evidence tending to prove such fact upon the second trial. It is not a question here of evidence tending to support the complaint, which would necessitate a submission to the jury for its consideration, but there is a failure of proof upon the controlling question of agency between appellant and the person driving his car. As a matter of law, the testimony fails in this regard, and does not

her she was going to use the car; that she acted upon her own free will; that the car belonged to her husband; that he never gave her any permission to use it; and that he had no idea she was going to use it, or expected to use the car.

Mrs. Fisher stated that when she was living in the Norway home in 1922 and 1923, on several occasions, she drove the Hobart car upon appellant's suggestion, but that since said time, he had never said anything to her about using his car; that she did not have his permission or direction to drive the car, or to give the same for his wife; that on the day in question, Mrs. Hobart called her by telephone and asked her to drive her to the party; that as far as she knew, appellant had no knowledge she was driving his car; and that he never gave her any instructions to drive the same.

No useful purpose would be served by another trial. Appellee was unable to produce any evidence tending to prove agency at the former trial, and we find no evidence tending to prove such fact upon the second trial. It is not a question here of evidence tending to support the complaint, which would necessitate a submission to the jury for its consideration, but there is a failure of proof upon the nonresidence question of agency between appellant and the person driving his car. As a matter of law, the testimony fails to bind required, and does not

tend to prove agency. Accidents such as the one involved in this case are to be regretted, but sympathy for the unfortunate victim cannot justify a departure from well established rules governing liability in such cases.

The judgment of the Circuit Court is therefore reversed.

Judgment reversed.

GEN. NO. 9814 AGENDA NO. 24

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

PHILIP H. KANTRO, APPELLEE,	)	
vs.	:	APPEAL FROM THE CIRCUIT
THE CITY OF ELGIN, a Municipal Corporation, et al., APPELLANT.	)	COURT OF KANE COUNTY.

HUFFMAN, P. J.

This is an action by appellee to recover for damages sustained by reason of falling upon a sidewalk in appellant city. Appellee was a passenger on a bus from Mason City, Iowa, bound for Valparaiso, Indiana, the city of his residence. The bus station was next door to a restaurant and cigar store. When the bus stopped in Elgin, appellee got out and entered the cigar store to make a purchase. He states people were standing in front of the entrance to the store, and that he passed around them and entered from an angle; that upon his coming out of the

PHILIP H. KAUTRO, APPELLEE,	)	
vs.	)	APPEAL FROM THE MUNICIPAL
THE CITY OF ELGIN, a municipal corporation, et al., APPELLANT.	)	COURT OF RANK COUNTY.

HUFFMAN, P. J.

This is an action by appellee to recover for damages sustained by reason of falling upon a sidewalk in appellant city. Appellee was a passenger on a bus from Mason City, Iowa, bound for Valparaiso, Indiana, the city of his residence. The bus station was next door to a restaurant and cigar store. When the bus stopped in Elgin, appellee got out and entered the cigar store to make a purchase. The station people were standing in front of the entrance to the store, and that he passed around them and entered from an angle; that upon his coming out of the

store, he stepped directly out upon the sidewalk and into a hole or worn out place, which caused him to fall whereby he sustained injury to his ankle as well as other bruises. He proceeded on the bus to Chicago, where his wife came after him. He was confined to the bed for ten or twelve days, and thereafter to the house for about a week before he was able to resume his duties. Trial resulted in verdict for $500.00, in favor of appellee, and appellant appeals from judgment rendered thereon.

Two errors for reversal are assigned. First, that the verdict is against the weight of the evidence; and second, that the court erred in admitting in evidence plaintiff's exhibit # 1.

With regard to the first contention of appellant, it appears from the evidence of the Mayor that he knew of the condition in the walk and had discussed the matter with other members of the City Council. It also appears from the evidence of a shopkeeper, that he had talked to the Street Commissioner about the condition of the walk. These things all occurred prior to appellee's injury. The walk at this place was constructed of stone slabs, and it appears from the evidence that the slab in question not only was old and worn, but was loose due to lack of proper support from below. The evidence on the part of appellant discloses that the slab was worn out from

store, he stepped directly out upon the sidewalk and into a hole or worn out place, which caused him to fall whereby he sustained injury to his ankle as well as other bruises. He proceeded on the box to Kansas, where his wife came after him. He was confined to his bed for ten or twelve days, and thereafter to the house for about a week before he was able to resume his duties. Trial resulted in verdict for $500.00, in favor of appellee, and appellant appeals from judgment rendered thereon.

Two errors for reversal are assigned. First, that the verdict is against the weight of the evidence; and second, that the court erred in admitting in evidence plaintiff's exhibit # 1.

With regard to the first contention of appellant, it appears from the evidence of the lawyer that he knew of the condition in the walk and had discussed the matter with other members of the city council. It also appears from the evidence of a superintendent, that he had talked to the street commissioner about the condition of the walk. These things all occurred prior to appellee's injury. The walk at this place was constructed of stone slabs, and it appears from the evidence that the slab in question not only was old and worn, but was loose due to lack of proper support from below. The evidence on the part of appellant discloses that the slab was worn out from

useage at the place where appellee fell. From a review of the case, we are not of the opinion the verdict was against the weight of evidence, but amply supported by the same.

With respect to appellant's second contention that the court erred in admitting appellee's exhibit # 1, which was a photograph of the stone slab in question, we do not find the abstract supports such contention. At the conclusion of the case on the part of appellee, his attorney offered the exhibit in evidence, to which offer appellant objected, and the objection was sustained by the court. It then appears that counsel for appellee offered the exhibit for a certain, specified, limited purpose, to which offer, appellant objected, and the objection was again sustained, whereupon appellee rested. At the conclusion of the evidence on behalf of appellant, the abstract discloses that attorney for appellee again offered plaintiff's exhibit # 1, in evidence, at which time attorney for appellant asked leave to recall two witnesses. These witnesses were recalled and examined by appellant with respect to the exhibit. At the close of this examination by appellant, no cross-examination appears to have been made, no further offer of the exhibit appears to have been made, no ruling of the court admitting the same in evidence appears to have been made, and no objection to its admission appears to

[illegible] at the place where appellee lived. [illegible] review of the case, we are not of the opinion the verdict was against the weight of evidence, but amply supported by the same.

With respect to appellee's second contention that the court erred in admitting appellee's exhibit # 1, which was a photograph of the house also in question, we do not find the contention supported by the contention. As the contention of the same on the part of appellee, his attorney offered the exhibit in evidence, to which offer appellant objected, and the objection was sustained by the court. It was thereupon that counsel for appellee offered the exhibit for a certain, specified, limited purpose, to which offer, appellant objected, and the objection was again sustained, whereupon appellee rested. At the conclusion of the evidence on behalf of appellant, the appellee disclosed that although, for appellee again offered plaintiff's exhibit # 1, in evidence, as stated once before, for appellant asked leave to recall two witnesses. These witnesses were recalled and examined by appellant with respect to the exhibit. At the close of this examination by appellant, no cross-examination appears to have been made, no further offer of the exhibit appears to have been made, no ruling of the court admitting the same in evidence appears to have been made, and no objection to its admission appears to

have been interposed by appellant. Therefore, the second contention of appellant is not open for review.

The additional abstract filed by appellee is not considered necessary, and the cost thereof is not to be taxed to appellant.

The judgment herein is affirmed.

Judgment affirmed.

have been interposed by appellant. Therefore, the second contention of appellant is not open for review.

The additional abstract filed by appellee is not considered necessary, and the cost thereof is not to be taxed to appellant.

The judgment herein is affirmed.

Judgment affirmed.

GEN. NO. 9843 AGENDA NO. 21

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

ROSCOE J. TODD, ADMINISTRATOR OF THE ESTATE OF NELLIE J. TODD, DECEASED, APPELLANT,	
vs.	APPEAL FROM THE CIRCUIT
S. S. KRESGE COMPANY, A CORPORATION, APPELLEE.	COURT OF KANE COUNTY.

HUFFMAN, P. J.

This case was before this court upon a previous appeal from judgment rendered on verdict in favor of plaintiff-administrator. The judgment was reversed, and the cause remanded. (303 Ill. App. 89) The facts are fully set out in that opinion. A second trial resulted in verdict for plaintiff-administrator. The court granted motion of defendant for a judgment notwithstanding the verdict. The administrator appeals.

The daughter of plaintiff's intestate was the only witness on either trial who testified for plaintiff concerning facts connected with the accident. Her testi-

GEN. NO. 3843 AGENDA NO. 21

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942.

ROSCOE L. TODD, ADMINISTRATOR OF THE ESTATE OF MARION L. TODD, DECEASED, APPELLANT, vs. S. S. KRESGE COMPANY, A CORPORATION, APPELLEE.	APPEAL FROM THE CIRCUIT COURT OF KANE COUNTY.

HUFFMAN, P. J.

This case was before this court upon a previous appeal from judgment rendered on verdict in favor of plaintiff-administrator. The judgment was reversed, and the cause remanded. (303 Ill. App. 89) The facts are fully set out in that opinion. A second trial resulted in verdict for plaintiff-administrator. The court granted motion of defendant for a judgment notwithstanding the verdict. The administrator appeals.

The daughter of plaintiff's intestate was the only witness on either trial who testified for plaintiff concerning facts connected with the accident. Her testi-

mony upon the second trial is substantially as it was upon the first. She states that on the evening in question, she accompanied her mother to appellee's store; that she and her mother visited this store frequently, and were both familiar with the operation of the doors at the entrance thereof; that the time in question was on Saturday night and a few minutes before nine o'clock, which was closing time; that when they came to the entrance of the store, the swinging door to her right was opened inwardly, and that she entered through this door; that she did not notice anybody about the door or holding it; that she preceded her mother through the door, and continued toward a merchandise counter intending to make a purchase; that as she reached this counter, she turned her head toward the doorway and observed her mother in the act of entering the store, and the swinging door returning to a closed position. She states that as the door closed, it struck her mother, causing her to fall, whereby she sustained a broken hip.

In the former appeal, it was held that for the doctrine of res ipsa loquitur to apply, it must appear the instrumentality causing the injury was under the control of the defendant, and the injury caused by some act incident to such control, and of such a nature that it would not have occurred but for the defendant's negligence. It was further observed that swinging doors such as involved in this case, were common to such places of business; that the operation

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In the former appeal, it was held that for the doctrine of res ipsa loquitur to apply, it must appear the instrumentality causing the injury was under the control of the defendant, and the injury caused by some act incident to such control, and of such a nature that it would not have occurred but for the defendant's negligence. It was further observed that swinging doors such as involved in this case, were common to such places of business; that the operation

thereof was not within the exclusive control of the proprietor of the store; but that persons using them took a distinct part in their operation, and were chargeable with the exercise of due care in the use thereof. Entrance doors to business establishments, although mechanical in operation, require a manual manipulation and commonly depend for such operation upon the persons using them. Injuries may occur in the use of such doors, either on the part of the person injured or from that of those using them at or near the same time as the person injured.

Where principles of law have been announced on a former appeal, they cannot be questioned upon a subsequent appeal in the same litigation. Pease v. Ditto, 189 Ill. 456, 463; Seawell v. Oregon Short Line R. R. Co., 278 Ill. 122; City of Chicago v. Lord, 279 Ill. 167. In granting the motion in this case, the question before the trial court was whether there was any evidence on the part of plaintiff fairly tending to prove the allegations of the complaint. McFarlane v. Chicago City Ry. Co., 288 Ill. 476, 478; Beckett v. Woollworth Co., 376 Ill. 470, 475, 476; Peters v. id, 376 Ill. 237, 241. Negligence on the part of the defendant is not to be presumed.

No useful purpose would be served in this case by another trial. Frequently in cases of this character, upon a second hearing, the testimony may not be the same as upon a previous hearing, but in this case, there is no new testimony, and that of the daughter is substantially

thereof was not within the railway property of the proprietor of the shore; but that persons using them took a distinct part in their operation, and were chargeable with the consequence of due care in the use thereof. Entrance doors to business establishments, although mechanical in operation, require a reasonable regulation and commonly depend for such operation upon the persons using them. Injuries may result in the use of such doors, either on the part of the person injured or from that of those using them at or near the time as the person injured.

These principles of law have been announced on a formal appeal, they cannot be questioned upon a subsequent appeal in the same litigation. Pease v. Little, 180 Ill. 450, 454; Maxwell v. Dayton Short Line R. R. Co., 278 Ill. 158; City of Chicago v. Joel, 271 Ill. 127. In granting the motion in this case, the question before the trial court was whether there was any evidence on the part of plaintiff fairly tending to prove the allegations of the complaint. Pennsylvania v. Chicago City Ry. Co., 238 Ill. 479, 489; Beckett v. Coolidge Co., 276 Ill. 470, 475; Lyons v. Id. 276 Ill. 534, 541. Negligence on the part of the defendant is not to be presumed.

No useful purpose would be served in this case by another trial. Frequently in cases of this character, upon a second hearing, the testimony may not be the same as upon a previous hearing, but in this case, there is no new testimony, and that of the daughter is substantially

the same as upon the former trial. She states that she and her mother were familiar with the operation of the door in question. She passed through the door and proceeded to a merchandise counter with her back to her mother. Upon glancing around to look for her mother, she observed the door was in the act of closing at the time when her mother was about to enter. In view of this evidence, we do not consider the trial court erred in granting the motion for judgment notwithstanding the verdict.

Judgment affirmed.

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Judgment affirmed.

Abstract

GEN. NO. 9846 AGENDA NO. 30

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1942

JOHN CHUCKLIN, APPELLEE, vs. FRANK O. LOWDEN and JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, A CORPORATION, APPELLANTS.	APPEAL FROM THE CIRCUIT COURT OF ROCK ISLAND COUNTY.

HUFFMAN, P. J.

This case was previously before this court, and the judgment reversed and the cause remanded (309 Ill. App. 24). There is little change in the testimony upon the second trial from that presented at the first trial, so far as the essentials are concerned. The case grows out of a collision between appellee's automobile, which he was then driving, and one of appellants' trains. The accident occurred shortly after six o'clock in the morning, at a street crossing located in the factory district of Moline.

GEN. NO. 9846 AUGUSTA NO. 30

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1942

JOHN GRUONELIN, APPELLEE, vs. FRANK O. LOWDEN and JOSEPH E. FLEMING, TRUSTEES OF THE ESTATE OF THE ORIGADOC, ROCK ISLAND & PACIFIC RAILWAY COMPANY, A CORPORATION, APPELLANTS.	APPEAL FROM THE CIRCUIT COURT OF ROCK ISLAND COUNTY.

HUFFMAN, P. J.

This case was previously before this court, and the judgment reversed and the cause remanded (309 Ill. App. 24). There is little change in the testimony upon the second trial from that presented at the first trial, so far as the essentials are concerned. The case grew out of a collision between appellee's automobile, which he was then driving, and one of appellants' trains. The accident occurred shortly after six o'clock in the morning, at a street crossing located in the factory district of Moline.

The testimony of appellee discloses that it was his habit to use this crossing in connection with his work, and that since 1927, he had passed over this street crossing five or six times a day in connection with his work. He states the sun was shining; that the windows of his car were closed; that he did not hear the train; that he did not see the train; that he was driving his car in second gear at about ten miles an hour; that the street was paved with brick; that he continued at the same rate of speed in crossing the track in question; that he never heard or saw the train; that he does not remember its striking his automobile; and does not remember being struck by anything. He says that he knows nothing of the accident and remembers nothing about it. He states that he was acquainted with the crossing; that the windows of his car were steamed over but that the windshield was clear. He testifies that he looked in both directions as he came upon the track, and saw no train. He further says that his brakes were in good condition, and that at a speed of ten miles an hour, he could have stopped almost instantly.

We find three other witnesses for appellee, whose testimony throws some light upon the accident. The witness Adams states that he was in the street over which the train was about to cross; that he saw appellee's automobile approaching the crossing at a slow rate of speed; that he saw the train coming from the west; that

The testimony of appellee discloses that it was his habit to use this crossing in connection with his work, and that since 1927, he had passed over this street crossing five or six times a day in connection with his work. He states the sun was shining; that the windows of his car were closed; that he did not hear the train; that he did not see the train; that he was driving his car in second gear at about ten miles an hour; that the street was paved with brick; that he continued at the same rate of speed in crossing the track in question; that he never heard or saw the train; that he does not remember its striking his automobile; and does not remember being struck by anything. He says that he knows nothing of the accident and remembers nothing about it. He states that he was acquainted with the crossing; that the windows of his car were opened over but that the windshield was clear. He testifies that he looked in both directions as he came upon the track, and saw no train. He further says that his brakes were in good condition, and that at a speed of ten miles an hour, he could have stopped almost instantly.

We find three other witnesses for appellee, whose testimony throws some light upon the accident. The witness Adams states that he was in the street over which the train was about to cross; that he saw appellee's automobile approaching the crossing at a slow rate of speed; that he saw the train coming from the west; that

it was at 13th street when he first noticed it; that he had started west across the street when he heard the noise of the engine striking the automobile. He states he saw the engine hit the car, and that appellee's car was driven against the curb by Hickey Brother's Cigar Store. The witness did not return to the scene of the accident but proceeded to his work. He estimates the speed of the train to have been fifty or fifty-five miles per hour.

The witness Reinhart was in Hickey Brother's Cigar Store on the southeast corner of 15th street, and the street which intersects it south of the tracks. He states he saw the train approaching the crossing from the west; that he heard the whistle; that it was then about 11th or 12th streets, and that he watched it until it reached 15th street. He estimates the speed at fifty miles per hour. He did not see appellee's automobile prior to the accident.

The witness Emerson worked at Hickey Brother's Store. He was in the store at the time of the accident. He states his attention was called to the train by its whistle; that he looked west and saw the train coming; that it was then between 13th and 14th streets; that he thinks the speed was from forty-five to fifty-five miles per hour; that he paid no attention to the train after he heard the whistle; that he heard the crash when the engine struck appellee's car; that he looked through the north window of the store

It was at 12th street that the first indication of trouble came. The train started with a jerk and the noise of the engine stopping the automobile. He turned to see the engine hit the car, and then experienced the drive behind the car by the heavy vehicle. The driver did not return to the scene of the accident but proceeded to his work. He estimated the speed of the train to have been fifty or sixty-five miles per hour.

The witness Feldhart was driving westward on Ellis Street on the eastbound corner of 12th street, and the street which intersects it north of the crossing. He stated he saw the train approaching the crossing from the west; that he heard the warning; that it was then about 1:00 or 12:50 o'clock; and that he watched to watch it received 12th street. He estimated the speed as fifty miles per hour. He did not see anything substantially prior to the accident.

The witness Sterpor testified as follows: He was in the place at the time of the accident. He stated his attention was called to the crash by the warning; that he looked west and saw the train coming; that it was then between 12th and 13th streets; that he thought the speed was from forty-five to fifty-five miles per hour; that he paid no attention to the train after he heard the warning; that he looked out through the front window of the truck

and saw the automobile coming across the street where it stopped against the curb by the store; that he went to the front door of the store and saw appellee lying on the pavement in front of the car; that he then called the police station for an ambulance.

The above briefly but fairly presents the evidence on behalf of appellee bearing upon the accident.

On the part of appellants, we find seven witnesses who testified directly concerning the accident. Dempsey, the trainmaster, was riding in the cab with the engineer at the time. He states that the bell was ringing and the whistle was being sounded as the train approached 15th street crossing; that the train was travelling between twenty and twenty-five miles per hour; that he saw the rear end of appellee's automobile struck by the right front corner of the engine; that the train was stopped between 15th and 16th streets; that he went back to the scene of the accident; that the train was pulling fifteen coaches at the time, and that to have stopped a train of this size, going at a speed of fifty to fifty-five miles an hour, would have required from 2600 to 2700 feet. He states this train was stopped in about 650 feet.

The engineer states the engine was eighty-three feet long; that the bell was ringing at the time, and was operated automatically; that it had been ringing constantly since he pulled out of the depot at Rock Island; that the whistle was being blown constantly; that as he approached

and saw the automobile coming across the street where it stopped against the curb by the store; that he went to the front door of the store and saw appellee lying on the pavement in front of the car; that he then called the police station for an ambulance.

The above briefly but fairly presents the evidence on behalf of appellee bearing upon the accident.

On the part of appellants, we find seven witnesses who testified directly concerning the accident. Tappey, the trainmaster, was riding in the cab with the engineer at the time. He states that the bell was ringing and the whistle was being sounded as the train approached 10th street crossing; that the train was travelling between twenty and twenty-five miles per hour; that he saw the rear end of appellee's automobile strike by the right front corner of the engine; that the train was stopped between 10th and 16th streets; that he went back to the scene of the accident; that the train was pulling fifteen coaches at the time, and that to have stopped a train of this size, going at a speed of fifty to fifty-five miles an hour, would have required from 2800 to 3000 feet. He states this train was stopped in about 600 feet.

The engineer states the engine was eight-three feet long; that the bell was ringing at the time, and was operated automatically; that it had been ringing constantly since he pulled out of the depot at Rock Island; that the whistle was being blown constantly; that as he approached

15th street crossing, the train was travelling about fifteen miles an hour; that he was not then increasing the speed but had shut down the steam as he was going to make a stop at the 17th street crossing; that he also had made a slight application of the brakes in order to slow down the train for the 17th street stop; that as he came upon 15th street, the fireman called to him, when he applied the brakes; that the first he saw of appellee's automobile was when it appeared upon the south side of the engine, and was struck on the right rear portion by the right front corner of the engine. He says he saw the car pushed clear of the train and out into the street. He stopped his train, went around to look at the front of the engine and saw marks on the right side of what is commonly called the cow-catcher, made by the impact between it and appellee's automobile. He says the sun was shining, and the track was dry; that the train is what is called the Golden State Limited, and was pulling fifteen coaches at the time; that he could not have reached a speed of fifty miles an hour with that train between the station in Rock Island and the 15th street crossing, because the engine did not have the power; and also that he had already cut the steam and was making application of brakes in order to bring the train to a stop at 17th street.

The fireman Baird was on the left hand side of the cab. This was the side from which appellee was approaching

15th street crossing, the train was travelling about fifteen miles an hour; that he was not then increasing the speed but had shut down the steam as he was going to make a stop at the 17th street crossing; that he also had made a slight application of the brakes in order to slow down the train for the 17th street stop; that as he came upon 15th street, the fireman called to him, when he applied the brakes; that the first he saw of appellee's automobile was when it appeared upon the south side of the engine, and was struck on the right rear portion by the right front corner of the engine. He says he saw the car passed clear of the train and out into the street. He stopped his train, went around to look at the front of the engine and saw marks on the right side of what is commonly called the cow-catcher, made by the impact between it and appellee's automobile. He says the sun was shining, and the track was dry; that the train is what is called the Golden State Limited, and was pulling fifteen coaches at the time; that he could not have reached a speed of fifty miles an hour with that train between the station in Roon Island and the 15th street crossing, because the engine did not have the power; and also that he had already cut the steam and was making application of brakes in order to bring the train to a stop at 17th street.

The fireman stated was on the left hand side of the cab. This was the side from which appellee was approaching

the crossing. He states the bell was ringing and the whistle blowing, and that this had been continuing since they pulled out of the Rock Island station; that as they approached the 15th street crossing, the train was going about twenty-five miles an hour; that it was being slowed down by the engineer for a stop at 17th street for the Moline station; that he saw an automobile coming from the north; that, in his opinion, it was travelling at about fifteen miles an hour; that it did not change speed; that it came upon the track directly in front of the engine when he lost sight of it; that he called to the engineer when he saw the automobile was not going to stop. He states that from the place where he first observed appellee's automobile approaching the track, was a distance of about ninety feet from the track, and at the time the engine was about one hundred forty feet west of the crossing; that he watched the car and as soon as it became apparent the driver thereof did not intend to stop, he called to the engineer.

The witness Wayaert was a member of the police department, assigned to crossing duty. He was in the vicinity of the 15th street crossing; he heard the train whistle, and on approaching 15th street, he saw a car coming from the north. As he reached the entrance to 15th street, he stopped his automobile to let this car from the north pass in front of him. He saw the car approaching the track and heard the engine whistling.

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The witness Wayrent was a member of the police department, assigned to crossing duty. He was in the vicinity of the 15th street crossing; he heard the train whistle, and on approaching 15th street, he saw a car coming from the north. As he reached the entrance to 15th street, he stopped his automobile to let this car from the north pass in front of him. He saw the car approaching the track and heard the engine whistling.

He saw a cloud of dust as the engine came upon the crossing. He states that the engine was "whistling plenty," and estimates that when he first heard its whistle was about 10th street.

The witness Olson worked in a factory located adjacent to the 15th street crossing. He was on his way to work and as he approached the crossing, he heard the whistle of a train. He says that it continued to whistle as he continued his way toward the crossing; that the pavement was dry and visibility good; that he saw an automobile coming down 15th street from the north, and at this time he heard the whistle of the train; that he saw the automobile come upon the track; that it was coming very slowly, and that it maintained the same rate of speed as it came upon the track. He says he saw that a man was driving the car; that it seemed to him, he was looking straight ahead; that as he saw the car coming upon the track and the train coming closer, he watched and saw the engine strike the automobile; that the automobile was almost across the track when it was struck; that the right rear fender was struck by the engine, and the automobile shoved across the street by the curb next to Hickey Brother's Cigar Store. He states the automobile was not overturned, and that he saw a man lying on the pavement in front of the car, but he did not see him fall out of the car; that the train was travelling about twenty-five to thirty miles an hour at the time of the accident, and the whistle was blowing; that he saw no other traffic on 15th street

He was a stand of that he was going some from the street. ing. He stated that the engine was "motoring" and estimated that when he first heard its activity was about 150M away.

The witness Olson worked in a factory located diagonally to the 15th street crossing. He was on his way to work and as he approached the crossing, he heard the whistle of a train. He says that it continued to whistle as he continued his way toward the crossing; that the crossing was dry and visibility good; that he saw an automobile coming down 15th street from the north, and at this time he heard the whistle of the train; that he saw the automobile come upon the track; that it was coming very slowly, and that it maintained the same rate of speed as it came upon the track. He says he did not see a car coming; he did say that it seemed to him, he was looking straight ahead; that as he saw the car coming upon the track and the train coming closer, he stopped and saw the engine strike the automobile; that the automobile had almost reached the track when it was struck; that the right rear fender was struck by the engine, and the automobile swung across the street by the engine, and the automobile stopped across the street by the north rail of Sidney Schwartz's clothing store. He stated the automobile was not overturned, and that he saw a man lying on the pavement in front of the car, but he did not see him fall out of the car; that the train was travelling about twenty-five to thirty miles an hour at the time of the accident, and the whistle was blowing; that he saw no other vehicle on 15th street

at the time except the automobile that was struck; that he went over and looked at the car and saw it had been hit on the right rear fender. He says that when he first saw the automobile approaching the crossing, it was about a block north of him.

The witness Bradford was employed in a factory adjacent to the crossing. He was on his way to work. He says that when he heard the train whistling, he hastened his gait, thinking it was a freight train, and that he might be able to get across the crossing before it blocked his pathway; but as he approached the crossing, he saw he could not make it. He says he saw an automobile coming from the north. He judges the speed to be from ten to fifteen miles an hour. He says he saw a man was driving the car; that he saw the engine hit the automobile; that he thinks the automobile lacked about one foot of clearing the engine. He says the car was turned part way around in the street, and that the rear bumper was knocked off. He did not observe any other traffic on 15th street at the time.

The witness Lewis was at the crossing on the morning in question. He states it was a nice, bright morning, and the visibility was good; that he was outside of Hickey Brother's Cigar Store; that he heard a train whistling; that he judged it was then about 11th street; that he remained standing on the corner by the cigar store; that he did not notice the automobile approaching the crossing until after he heard the train coming; that he saw the car

at the time except the automobile that was already; that he went over and looked at the car was not at fault; was hit on the right rear fender. He says that when he first saw the automobile approaching the crossing, it was about a block north of him.

The witness Bradford was employed in a factory adjacent to the crossing. He was on his way to work. He says that when he heard the brake shrieking, he hastened his pace, thinking it was a trolley coming, and that he might be able to get across the crossing before it blocked his pathway; but as he approached the crossing, he saw he could not make it. He says he saw an automobile coming from the north. He judges the speed to be from ten to fifteen miles an hour. He says he saw a man driving the car; that he saw the engine hit the automobile; that he thinks the automobile lacked about one foot of clearing the engine. He says the car was turned part way across the street, and that the rear bumper was knocked off. He did not observe any other traffic on 15th street at the time.

The witness Lewis was at the crossing on the morning in question. He states it was a rainy, bright morning, and the visibility was good; that he was outside of Kirkey Brother's cigar store; that he heard a train whistling; that he judged it was then about 11th street; that he remained standing on the corner by the cigar store; that he did not notice the automobile approaching the crossing until after he heard the train coming; that he saw the car

coming from the north toward the crossing; that it was coming slowly; that the train at that time was about 13th street; that as he saw the train come across 14th street, the automobile was still approaching the tracks; that he looked at the automobile in an effort to see if he could not call the driver's attention to the fact a train was coming; that the train kept whistling all the time, and the automobile kept slowly approaching the crossing; that he could not succeed in attracting the driver's attention; that when the train whistled for the 14th street crossing; it appeared to him the automobile was going to stop; that the whistle kept blowing, that the car kept slowly on its way toward the tracks; that he did not see the driver of the car turn his head either way, and that he was almost across the track before his car was struck. The witness states that when the car was struck by the engine, it was turned around in the street and pushed toward where he was standing by the cigar store; that he ran into the street out of the pathway of the automobile. He says he was never able to attract the attention of the driver of the car; that he looked at the car after the accident and saw that the right rear portion was damaged the most. He states he saw no other traffic on 15th street at the time; that the whistle was blowing and the bell was ringing continuously as the train approached 15th street crossing; that the train was making the noise usual to a moving train, and that he could hear this noise for about a block; that the right rear end

coming from the north toward the crossing; that it was coming slowly; that the train at that time was about 15th street; that as he saw the train come across 14th street, the automobile was still approaching the tracks; that he looked at the automobile in an effort to see if he could not call the driver's attention to the fact a train was coming; that the train kept whistling all the time, and the automobile kept slowly approaching the crossing; that he could not succeed in attracting the driver's attention; that when the train whistled for the 14th street crossing; it appeared to him the automobile was going to stop; that the whistle kept blowing, that the car kept slowly on its way toward the tracks; that he did not see the driver of the car turn his head either way, and that he was almost across the track before his car was struck. The witness states that when the car was struck by the engine, it was turned around in the street and pushed toward where he was standing by the cigar store; that he ran into the street out of the pathway of the automobile. He says he was never able to attract the attention of the driver of the car; that he looked at the car after the accident and saw that the right rear portion was damaged the most. He states he saw no other traffic on 15th street at the time; that the whistle was blowing and the bell was ringing continuously as the train approached 15th street crossing; that the train was making the noise usual to a moving train, and that he could hear this noise for about a block; that the right rear end

of the automobile was bumped by the front of the engine; that his attention was held to the oncoming train and the approaching automobile, and that he watched them both until the time of the impact.

It is incumbent upon the plaintiff in a case of this character to show due care and caution. According to the testimony of the plaintiff, he was thoroughly familiar with this crossing and had been using the same daily since 1927. He says he neither saw nor heard the train, and does not remember its striking his automobile. The evidence shows that he had almost cleared the path of the approaching train. It is obvious that had he seen it, he could have either stopped his car or have cleared the track. The fireman who saw his car approaching the crossing, had no cause to presume that the driver thereof would act otherwise than a reasonably prudent person would do, and would refrain from driving his automobile upon the track directly in front of the train, thus putting himself in a place of imminent peril. He states that as soon as it became obvious to him the driver of the car did not intend to stop, he immediately called to the engineer, who brought the train to a stop. The evidence of the witnesses who were at the crossing, and who are disinterested, clearly established the fact that the bell and the whistle of the engine were being sounded continuously from some several blocks back, and were being so sounded at the time of the collision with appellee's automobile. Some of them saw the collision. One of them states that he endeavored to

of the automobile was caused by the fault of the driver; that his attention was held to the approaching train and the approaching automobile, and that he watched them both until the time of the impact.

It is incumbent upon the plaintiff in a case of this character to show due care and caution. According to the testimony of the plaintiff, he was thoroughly familiar with this crossing and had been using the same daily since 1924. He says he neither saw nor heard the train, and does not remember his striking the automobile. The evidence shows that he had almost cleared the path of the approaching train. It is obvious that had he seen it, he could have either stopped his car or have cleared the track. The fireman who saw his car approaching the crossing, had no cause to presume that the driver thereof would act otherwise than a reasonably prudent person would do, and would refrain from driving his automobile upon the track directly in front of the train, thus putting himself in a place of imminent peril. He states that as soon as it became obvious to him the driver of the car did not intend to stop, he immediately called to the engineer, who brought the train to a stop. The evidence of the witnesses who were at the crossing, and who are disinterested, clearly established the fact that the bell and the whistle of the engine were being sounded continuously from some several blocks back, and were being so sounded at the time of the collision with appellee's automobile. Some of them saw the collision. One of them states that he endeavored to

attract the attention of appellee, so that he might take action for his safety.

It was urged that since two juries had found for appellee the verdict should be permitted to stand, under the rule as observed in the case of Hinkle v. Block & Kuhl Co., 259 Ill. App. 674. However, it will appear in that opinion, the court found there was evidence tending to support the declaration. It recognized that such rule is not operative where as a matter of law, the testimony does not fairly tend to prove the cause of action. It is with much reluctance this court again remands this cause, but we find nothing in appellee's evidence tending to prove due care and caution upon his part. On the contrary, the evidence in the case tends to prove lack of the observance of such conduct as an ordinary, prudent person would exercise under similar conditions and circumstances.

This was a heavy passenger train, pulling up-grade, with the whistle and bell in continuous operation and making all the other confusion and noise incident to a train of such character. Appellee was in possession of his normal faculties. He was in the habit of using this crossing several times each day over a period of many years. The physicial facts indicate the appellee was in the act of clearing the track when his car was struck. Although he states that he looked and did not see the train, yet under the circumstances existing herein, we do not consider such statement sufficient to establish due care.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

attract the attention of appellee, so that he might take action for his safety.

It was urged that since two juries had found for appellee the verdict should be permitted to stand, under the rule as observed in the case of Tinkle v. Block - Kuhl Co., 259 Ill. App. 674. However, it will appear in that opinion, the court found there was evidence tending to support the declaration. It recognized that such rule is not operative where as a matter of law, the testimony does not fairly tend to prove the cause of action. It is with much reluctance this court again reverses this cause, but we find nothing in appellee's evidence tending to prove due care and caution upon his part. On the contrary, the evidence in the case tends to prove lack of the observance of such conduct as an ordinary, prudent person would exercise under similar conditions and circumstances.

This was a heavy passenger train, pulling up-grade, with the whistle and bell in continuous operation and making all the other consideration and noise incident to a train of such character. Appellee was in possession of his normal faculties. He was in the habit of making this crossing several times each day over a period of many years. The physical facts indicate the appellee was in the act of leaving the track when his car was struck. Although he states that he looked and did not see the train, yet under the circumstances existing herein, we do not consider such statement sufficient to establish due care.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

GENERAL NO. 9783 Abstract AGENDA NO. 2.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1942

MILDRED SIDNEY BALDWIN, Appellant vs. PEORIA STAR COMPANY, a corporation, LOUIS PROEHL, MAY B. FINNEY, LUELLA B. EYSTER, RAYMOND E. EYSTER, VIRGINIA EYSTER DRURY, CLAUDE U. STONE, CLAUDE U. STONE, Executor and Trustee of the Estate of FANNIE G. BALDWIN, deceased, HELEN L. BALDWIN and MARGARET S. BALDWIN, Appellees.	APPEAL FROM CIRCUIT COURT OF PEORIA COUNTY.

DOVE, J.:

Peoria Star Company, a corporation, is the publisher of the Peoria Star, a daily newspaper. The corporation was organized in 1897, with a capital stock of $25,000.00, divided into 250 shares. On October 11, 1920, the capital stock was increased to $100,000.00, with 1000 shares. The additional 750 shares were issued as a stock dividend against a surplus of approximately $75,000.00. On December 4, 1939, appellant filed a complaint against appellees in the circuit court of Peoria County to establish her alleged title to 248 shares of the original issue, claimed as a gift from her mother, Fannie G. Baldwin, now deceased, and 744 of the shares issued as a stock dividend, aggregating 992 shares claimed.

Answers to the complaint and replies were filed. All the pleadings were verified. The cause was referred to a special master, who recommended a decree finding appellant is the owner of 248 shares of the capital stock. The exceptions of appellant to the master's report were overruled, the exceptions of appellees were sustained, and a decree, from which this appeal is prosecuted, was entered, dismissing the complaint for want of equity. The pertinent portions of the complaint allege that appellant's mother, Fannie G. Baldwin, was the owner of all the 250 shares of the capital stock, and that on February 15, 1918, she transferred and assigned all her right, title and interest therein to appellant, pursuant to the provisions of a written contract of that date between them, as a gift inter vivos, reserving the income, dividends and the right to vote the stock during her lifetime, as she saw fit, for appellant's best interest, at any stockholders' meeting; that immediately thereafter the corporation, by Fannie G. Baldwin, its president, and May B. Finney, its secretary, issued a certificate for 250 shares to appellant, which she delivered the next day for cancellation and received a certificate for 248 shares, reciting on its face: "This certificate is subject to the terms and conditions of an agreement between Fannie G. Baldwin and Sidney Baldwin, dated February 15, 1918"; that she has ever since been the owner and holder of such certificate and that it has never been surrendered, transferred, sold, pledged or assigned by her, and has never been lawfully cancelled on the stock books or records of the corporation. The increase of the capital stock and the subsequent issue of 1000 shares to her mother and others, including appellees, are then set out, and it is alleged that such acts were all without her knowledge, consent or acquiescence, and were illegal and in fraud

answers to the complaint and replies were filed. All the allegations were verified. The cause was referred to a special master, who recommended a decree finding appellant is the owner of 248 shares of the capital stock. The exceptions of appellant to the master's report were overruled, the exceptions of appellees were sustained, and a decree, from which this appeal is prosecuted, was entered, dismissing the complaint for want of equity. The pertinent portions of the complaint allege that appellant's mother, Fannie G. Baldwin, was the owner of all the 250 shares of the capital stock, and that on February 15, 1918, she transferred and assigned all her right, title and interest therein to appellant, pursuant to the provisions of a written contract of that date between them, and gift inter vivos, reserving the income, dividends and the right to vote the stock during her lifetime, as she saw fit, for appellant's best interest, at any stockholders' meeting; that immediately thereafter she conveyed, by Fannie G. Baldwin, its president, and by D. Finney, its secretary, issued a certificate for 250 shares to appellant, which she delivered the next day for cancellation and received a certificate for 248 shares, reading on its face: "This certificate is subject to the terms and conditions of an agreement between Fannie G. Baldwin and Sidney Baldwin, dated February 15, 1918"; that she has ever since been the owner and holder of such certificate and that it has never been surrendered, transferred, sold, pledged or assigned by her, and never been lawfully cancelled on the stock books or records of the corporation. The increase of the capital stock and the subsequent issue of 1000 shares to her mother and others, including appellees, are then set out, and it is alleged that such acts were all without her knowledge, consent or acquiescence, and were illegal and in fraud

of her right and title, without consideration, and were null and void. It is further alleged that neither appellant's mother, who died on December 3, 1938, nor any other officer of the corporation reported to her or kept her advised of the affairs and doings of the company; that appellant was almost continuously absent from Peoria from February 15, 1918, until shortly before her mother's death, and paid no attention to the corporations' affairs, wholly relying upon the actions and good faith of her mother to represent her interest therein; that she was designedly and continuously kept in ignorance of the conditions and management of the affairs of the corporation, and did not become advised of the details of the issue of the 1000 shares of stock until after her mother's death; ~~upon examination of the corporate books and records~~ that her counsel made inquiry but ~~to ascertain~~ the corporate records prior to 1920 were not available, and the officers and agents of the corporation reported they were lost or had otherwise disappeared. The complaint charges, on information and belief, that such records were intentionally destroyed by some person, officer or agent of the corporation, for the purpose of defrauding appellant of her rights and to prevent the true facts pertaining to the issue of the increase in stock from becoming known; that on December 20, 1938, Claude U. Stone caused a meeting of the stockholders to be held, and thereat illegally and unlawfully claimed the right to vote 798 shares of the capital stock allegedly in his name as executor of the estate of Fannie G. Baldwin, deceased, and thereby caused himself to be elected president of the corporation; that ever since the death of Fannie G. Baldwin he has dominated and controlled the board of directors and dictated all the financial and business affairs of the corporation; that he is inexperienced in newspaper work and is a lawyer and master in chancery of the circuit court; that he has mismanaged the affairs

of her right and title, without consideration, and were null and void. It is further alleged that neither appellant's mother, who died on December 3, 1920, nor any other officer of the corporation reported to her or kept her advised of the affairs and doings of the company; that appellant was almost continuously absent from Texas from February 15, 1918, until shortly before her mother's death, and paid no attention to the corporations' affairs, wholly relying upon the actions and good faith of her mother to represent her interest therein; that she was deliberately and continuously kept in ignorance of the conditions and management of the affairs of the corporation, and did not become advised of the details of the issue of the 1000 shares of stock until after her mother's death; [redacted] [redacted] the corporate records prior to 1920 were not available, and the officers and agents of the corporation reported they were lost or had otherwise disappeared. The complaint charges, on information and belief, that such records were intentionally destroyed by some person, officer or agent of the corporation, for the purpose of defrauding appellant of her rights and to prevent the true facts pertaining to the issue of the increase in stock from becoming known; that on December 20, 1928, Olaude O. Stone caused a meeting of the stockholders to be held, and thereat illegally and unlawfully claimed the right to vote 708 shares of the capital stock allegedly in his name as executor of the estate of Francis G. Baldwin, deceased, and thereby caused himself to be elected president of the corporation; that ever since the death of Francis G. Baldwin he has dominated and controlled the board of directors and dictated all the financial and business affairs of the corporation; that he is interested in newspaper work and is a lawyer and master in chancery of the circuit court; that he has mismanaged the affairs

of the corporation, caused it to incur large indebtedness, suffered the circulation of the newspaper to greatly decrease, and that appellant fears that by reason of the foregoing, the corporation is drifting into insolvency; that at the time of the meeting referred to, she was unable to assert her rights under the contract and stock certificate mentioned, because at that time she had no knowledge or recollection of their whereabouts, and did not discover them until about November 1, 1939; that immediately upon finding them she delivered them to her counsel;that at a special meeting of the stockholders on November 10, 1939, her counsel protested against any procedure at the meeting and called attention to her claim to 992 shares of the capital stock. The complaint prays that the transfers of all shares of the capital stock to Fannie G. Baldwin and the other defendants since October 11, 1920, be declared invalid and void, and that appellant be declared to be the owner of 248 shares of the original stock and 744 snares of the stock issued as a stock dividend; that Claude U. Stone, as executor and trustee of her mother's estate, be ordered to transfer to her a certificate for such 744 shares; and for an accounting by the defendants.

The nnswers of appellees deny seriatim all the allegations of the complaint relative to the alleged transfer of 250 shares of the capital stock by Fannie G. Baldwin to appellant, the delivery by appellant of any certificate therefor for cancellation, or the issue of any new stock certificate to her; they allege the only stock ever transferred to appellant by her mother, or otherwise, was one share to enable her to qualify as a director; that prior to the issue of the 1000 shares of stock, 250 shares of the original stock were surrendered by Fannie G. Baldwin and cancelled; deny that the issue of the 1000 shares was in fraud of appell nt's rights, or void; deny that she is entitled to 992

of the corporation, caused it to incur large indebtedness, suffered the circulation of the newspaper to greatly decrease, and that appellant feared that by reason of the foregoing, the corporation is drifting into insolvency; that at the time of the meeting referred to, she was unable to assert her rights under the contract and stock certificate mentioned, because at that time she had no knowledge or recollection of their whereabouts, and did not discover them until about November 1, 1939; that immediately upon finding them she delivered them to her counsel; that at a special meeting of the stockholders on November 14, 1939, her counsel protested against any procedure at the meeting and called attention to her claim to 992 shares of the capital stock. The complaint prays that the transfers of all shares of the capital stock to Francis G. Baldwin and the other defendants since October 11, 1939, be declared invalid and void, and that appellant be declared to be the owner of 246 shares of the original stock and 744 shares of the stock issued as a stock dividend; that Claude U. Stone, as executor and trustee of her mother's estate, be ordered to transfer to her a certificate for such 744 shares; and for an accounting by the defendants.

The answers of appellees deny certain of the allegations of the complaint relative to the alleged transfer of 250 shares of the capital stock by Francis G. Baldwin to appellant, the delivery by appellant of any certificate therefor for cancellation, or the issue of any new stock certificate to her; they allege the only stock ever transferred to appellant by her mother, or otherwise, was one share to enable her to qualify as a director; that prior to the issue of the 1000 shares of stock, 250 shares of the original stock were surrendered by Francis G. Baldwin and cancelled; deny that the issue of the 1000 shares was in fraud of appellant's rights, or void; deny that she is entitled to any

shares or any other share; deny appellant had no knowledge of the corporate acts until after the death of her mother; allege she was present either in person or by proxy at all meetings during the period stated in the complaint; deny she was ignorant of the corporate affairs, and deny she ever had possession of the 248 shares or the purported contract prior to November 1, 1939; allege that at a meeting of the stockholders on March 31, 1939, at which she was present in person, Claude U. Stone voted 798 shares as executor and trustee of her mother's estate; that she made no protest, and voted only one share; that at her request to Stone prior to the meeting, she was elected a director and vice-president, for which she thanked him; deny the alleged search for the certificate of 248 shares of stock; admit the officers of the corporation informed her attorney that all stock records and corporation records, prior to 1920 had been lost or destroyed; deny they were destroyed by Fannie G. Baldwin or any of the present officers of the corporation, and say they never saw them, except that May B.Finney saw them from time to time in possession of Joseph A. Weil, as attorney,director and vice-president of the corporation, but not after he ceased to act in that capacity, and that from 1910 to 1925 he was attorney for the corporation, and also a director and vice-president, and had possession of all its books and records; that he was also during that time attorney for Fannie G. Baldwin and had in his possession her private papers and documents, including wills and undelivered stock of the corporation, including the purported certificate for 248 shares; that in 1925 Fannie G. Baldwin discharged him as attorney for the corporation and herself, had him removed from his director-ship, and demanded from him the company books and records and her private papers, which he refused to deliver until she employed Frank Quinn and Shelton McGrath, attorneys, who, after repeated demands,

hares or any other shares; deny defendant had no knowledge of the corporate acts until after the death of her mother; allege she was present either in person or by proxy at all meetings during the period stated in the complaint; deny she was ignorant of the corporate affairs, and deny she ever had possession of the 248 shares of the purported contract prior to November 1, 1929; allege that at meeting of the stockholders on March 31, 1929, at which she was present in person, claude U. Stone voted 748 shares as executor and trustee of her mother's estate; that she made no protest, and voted only one share; that at her request to Stone prior to the meeting, he was elected a director and vice-president, for which she thanked him; deny the alleged reason for the certificate of 248 shares of stock; admit the officers of the corporation informed her attorney that all stock records and corporation records, prior to 1920 had been lost or destroyed; deny they were destroyed by Francis G. Baldwin or any of the present officers of the corporation, and say they never saw them, except that May G.Finney saw them from time to time in possession of Joseph A. Neil, as attorney,director and vice-president of the corporation, but not after he ceased to act in that capacity, and that from 1910 to 1929 he was attorney for the corporation, and also a director and vice-president, and had possession of all its books and records; that he was also during that time attorney for Francis G. Baldwin and had in his possession her private papers and documents, including bills and unsaleable stock of the corporation, including the purported certificate for 248 shares; that in 1925 Francis G. Baldwin discharged him as attorney for the corporation and herself, had his removed from his director-ship, and demanded from him the company books and records and her private papers, which he refused to deliver until she employed Frank Quinn and Quinlan Cogran, attorneys, who, after repeated demands,

obtained only a part of the books and records, not including any which appellant alleges were concealed or destroyed, nor any of her private papers or such stock certificate; allege that the books and records which appellant claims were concealed or destroyed are in her possession and that she is unwilling to disclose their existence or contents; deny the allegations as to inexperience and mismanagement of Claude U. Stone and danger of insolvency, and allege increased circulation of the newspaper, and operating economies of over $50,000.00; allege that appellant at all times up to November 1, 1939, recognized her mother as the unqualified owner of 798 shares of the capital stock, and subsequent to February 15, 1918, signed and delivered numerous proxies in which she referred to herself as owning only one share; that she made numerous statements and wrote numerous letters in which she stated her mother was the owner of the company; that she was present in person or by proxy at numerous meetings of the stockholders at which it was stated she was the owner of only one share, and that she knew at all times that her mother owned 798 shares; that appellee Stone informed her the books so showed and that the other shares were owned by the directors, including appellant; that subsequent to February 15, 1918 and prior to her mother's death, appellant was a director of the corporation and had access to the books and should have known what they showed; that during her mother's entire lifetime she (appellant), made no claim to her to the ownership, in reversion or otherwise, of any of the shares; that after her mother's death Claude U. Stone, as executor and trustee of her mother's estate paid her in regular monthly installments, more than $6000.00 in six months, and that it was not until after such payments ceased that appellant made any claim to him that she owned more than one share of the capital stock, and alleges she is estopped from making such claim by laches; alleges, on information and belief, that the contract relied upon by appellant was never delivered to her, but that during the lifetime of Fannie G. Baldwin, it remained

obtained only a part of the books and records, not including any which appellant alleges were concealed or destroyed, nor any of her private papers or such stock certificates; allege that the books and records which appellant claims were concealed or destroyed are in her possession and that she is unwilling to disclose their existence or contents; deny the allegations as to inexperience and mismanagement of claude U. Stone, danger of insolvency, and allege increased circulation of the newspaper, and operating economies of over $50,000.00; allege that appellant at all times up to November 1, 1928, recognized her mother as the unqualified owner of 788 shares of the capital stock, and subsequent to February 16, 1928, signed and delivered numerous proxies in which she referred to herself as owning only one share; that she made numerous statements and wrote numerous letters in which she stated her mother was the owner of the company; that she was present in person or by proxy at numerous meetings of the stockholders at which it was stated she was the owner of only one share, and that she knew at all times that her mother owned 788 shares; that appellee Stone informed her the books so showed and that the other shares were owned by the directors, including appellant; that subsequent to February 16, 1928 and prior to her mother's death, appellant was a director of the corporation and had access to the books and should have known what they showed; that during her mother's entire lifetime she made no claim to her to the ownership, in reversion or otherwise, of any of the shares; that after her mother's death Claude U. Stone, as executor and trustee of Mrs. Palmer's estate paid her in regular monthly installments, more than $6000.00 in six months, and that it was not until after such payments ceased that appellant made any claim to him that she owned more than one share of the capital stock, and that he was estopped from making such claim by instead; allege, on information and belief, that the contract relied upon by appellant was never delivered to her, but that during the illness of Frank C. Baldwin, it remained

in her possession and was wholly unknown to appellant until discovered by her among her mother's private papers after her death and was signed by appellant thereafter; that the certificate for 248 shares of the capital stock was never delivered to appellant or to any one for her, but was unknown to her during her mother's lifetime, and until her mother's death was in the possession of Joseph A. Weil, who obtained possession as the personal attorney of Fannie G. Baldwin, and did not surrender possession toher when demand was made for her private papers; and that the entire proposed transaction relative to which such papers were drafted was never at any time consummated; and that the ownership of the stock is as shown by the corporate records.

The replies of appellant to the answers admit that up to and including the year 1925, Joseph A. Weil had in his possession "certain" books and records of the corporation, but deny he had in his possession all the private papers and documents of Fannie G. Baldwin, including her will, and deny he had any undelivered stock certificate, and particularly the certificate for 248 shares; and allege that every book, paper or document which had been in his possession were delivered to Frank J. Quinn, and that thereafter no claim was made upon Mr. Weil for any of the same. The replies then traverse the other allegations of the answers.

Appellant's father, Eugene F. Baldwin, was one of the original stockholders of the corporation, owning one share. He was the manager and editor of the newspaper until his death on November 9, 1914. At that time he still owned one share of the capital stock, which, with all his other property he bequeathed to Fannie G. Baldwin, his widow, who owned the other 249 shares. She thereby became the owner of all the capital stock. Shortly after the death of Eugene F. Baldwin, appellant and May B. Finney became directors of the corporation, with Fannie G.

in her possession and was rightly entitled to [illegible] until discovered by her among her mother's private papers after her death. It is alleged by appellant that [illegible] that the certificate for 240 shares of the capital stock was never delivered to appellant or [illegible] her, but was unknown to her during her mother's lifetime, and until after her mother's death by [illegible] of one R. Hall, who obtained possession of the records [illegible] of Fannie G. Baldwin, and the [illegible] arrangement possession under which [illegible] for her private papers; and that the entire proceeds [illegible] relative to which [illegible] were drafted was [illegible] at the time [illegible]; and that the ownership of the stock is [illegible] by the corporate records.

The rights of appellant to the shares depend in the [illegible] during the year 1905, [illegible] in the possession of [illegible] books and records of the corporation, but [illegible] in the possession of Fannie G. Baldwin, making her will, and [illegible] unobtrusive [illegible] certificate, and particularly the certificate for 240 shares; and [illegible] that even [illegible], paper or document which [illegible] in the possession [illegible] delivered to Frank G. Fuller, and that [illegible] for any of the [illegible] provides for [illegible] of the [illegible].

Appellant's father, Eugene F. Baldwin, was one of the original stockholders of the corporation, owning one share. He was the manager and editor of the newspaper until his death on November 4, 1914. At that time he still owned one share of the capital stock, which, with all his other property, he bequeathed to Fannie G. Baldwin, his widow, who owned the other 239 shares. The thereby became the owner of all the capital stock. Shortly after the death of Eugene F. Baldwin, appellant and Ary B. Finney became directors of the corporation, with Fannie G.

Baldwin, the other director, who was the president. This was evidently accomplished by the transfer of one qualifying share each to appellant and May B. Finney by Fannie G.Baldwin. Harry M. Powell, one of the original stockholders and a former director was employed as general manager of the corporation. Appellant was continuously a member of the board of directors from that time until 1931. In November, 1920, after the capital stock was increased, the number of directors was also increased to five, and Clarence Eyster and Joseph A. Weil, now deceased but who appeared in the trial court as one of appellant's counsel, were added to the board, and the latter was elected as vice-president in place of appellant, who resigned. At that time Mr. Weil was attorney for the corporation and Fannie G. Baldwin. Appellant was again elected a director on March 31, 1939.

On December 15, 1915, about one year after her husband's death, Fannie G. Baldwin executed a will by which she devised certain real estate to Frank E. Baldwin, her son, and made a specific bequest of all her stock in the corporation naming appellant and Harry M. Powell as executors. By a codicil of January 22, 1920, Joseph A.Weil was named as co-executor with appellant, in place of Harry M. Powell, who died on the 5th of that month.

On December 1, 1920, 879 shares of the capital stock were issued to Fannie G. Baldwin. The five members of the board of managers of the newspaper (not identical, except May B.Finney, with the five directors) received twenty shares each as a bonus. Twenty shares for voting purposes (afterward cancelled) were issued to Joseph A.Weil. The remaining share was issued to appellant. Claude U. Stone delivered it to her by mail. Thereafter the holdings of the five managers were increased to 40 shares each through a donation of 100 shares from Fannie G. Baldwin. She was president of the corporation until her death, on December 3,1938.

Baldwin, the other director, who was the president. This was evidently accomplished by the turn for a new qualifying [illegible] to appoint and May 2, Finney to remain a director. Finally, one of the original stockholders and a large creditor was appointed general manager of the corporation. Operating was continued by a majority of the board of directors from time to time until 1921. In November, 1920, after the capital stock was increased, the number of directors was increased to five, and Alexander was elected to fill the vacancy. Finally, upon appellant's counsel, were added to the board, and the latter was elected as vice-president in place of Joseph M. Wright. At that time Mr. Hall was attorney for the corporation and Franklin G. Baldwin. Appellant was again elected a director on March 21, 1922.

On December 10, 1919, about one year after the husband's death, Fannie G. Baldwin executed a will by which she devised certain real estate to Frank E. Baldwin, her son, and gave a specific bequest of all her stock in the corporation. Having qualified in Mercy H. Wright as executrix by a codicil of January 21, 1920, Fannie G. Hall was named as co-executor with appellant, in place of Mercy H. Wright, who died on the 5th of that month.

On December 1, 1920, 270 shares of the capital stock were issued to Fannie G. Baldwin. The five members of the board of management of the newspaper (not incorporated, except by a[illegible]), with the five directors) received twenty shares each in a bonus. Twenty shares for voting purposes (afterward cancelled) were issued to Joseph M. Wright. The remaining shares was issued to appellant. Alice G. Moore delivered it to her by mail. Therefore the holdings of the five managers were increased to 40 shares each, through a bonusing of 160 shares from Fannie G. Baldwin. She was president of the corporation until her death, on December 1, 1922.

Testimony for defense in the trial court as

Claude U.Stone has since the death of Fannie G. Baldwin been president of the corporation by election of the board of directors of the corporation. May B. Finney, one of the appellees, has been treasurer, and with the exception of one year, 1919-1920, has been secretary of the corporation ever since the death of Eugene F. Baldwin. Helen L. Baldwin and Margaret S. Baldwin are the children of Frank E. Baldwin, the deceased brother of appellant. He died in 1926.

At the time this suit was instituted the corporate records showed the following stock-ownership by appellees: Claude U. Stone, executor and trustee of the estate of Fannie G. Baldwin, deceased, 798 shares; Claude U. Stone, individually, 21 shares; May B. Finney, 40 shares; Louis Proehl, 40 shares; Luella B. Eyster, 26 shares; Raymond D. Eyster, 7 shares; Virginia Eyster Drury, 7 shares; Peoria Star Company (stock in treasury) 60 shares; Mildred Sidney Baldwin, 1 share. The Eysters and Mrs. Drury are the widow and heirs of Clarence Eyster, deceased, one of the above mentioned managers. May B. Finney and Louis Proehl are two of the other managers. Claude U. Stone acquired 20 shares from one of the other managers and 1 share from Fannie G. Baldwin.

On December 10, 1923, Fannie G. Baldwin executed a contract with the corporation and the board of managers, reciting she was the o ner of a large majority of the stock, and believed it was of vital importance that the existing management should continue as long as possible. It provided that their contracts of employment of November 20,1920, should be extended five years beyond their termination, on the same terms, except that the contracts should not be cancellable at the corporation's will, but only in case of actual incomp tency or incapacity of the members; that before Fannie G. Baldwin should sell

Claude G. Stone was since the death of Francis G. Baldwin been president of the corporation by election of the board of directors of the corporation. Guy W. Finney, one of the trustees, has been treasurer, and after the expiration of the year, 1919-1920, has been secretary of the corporation ever since the death of Eugene F. Baldwin. Helen B. Baldwin and Margaret G. Baldwin are the children of Frank E. Baldwin, the deceased brother of Francis. He died in 1920.

At the time this suit was instituted the corporation recorded the following stock-ownership by shareholders: Claude G. Stone, executor and trustee of the estate of Francis E. Baldwin, deceased, 720 shares; Claude G. Stone, individually, 21 shares; Guy W. Finney, 40 shares; Louis Troehl, 40 shares; Lucille E. Weber, 10 shares; Raymond D. Eyster, 7 shares; Virginia Weber Drury, 7 shares; Scale Beam Company (stock in treasury) 60 shares; Mildred Blanche Baldwin, 1 share. The Weberts and Drury are the widow and heirs of Clarence Weber, deceased, one of the above mentioned managers. Guy W. Finney and Louis Troehl are two of the other managers. Claude G. Stone required 20 shares from one of the other managers and 1 share from Francis G. Baldwin.

On December 19, 1922, Francis G. Baldwin executed a contract with the corporation and the board of managers, providing the sale under of a large majority of the stock, and believed it was of vital importance that the existing management should continue as long as possible. It provided that their contracts of employment of November 8, 1920, should be extended five years beyond their termination, on the same terms, except that the contracts should not be cancel[illegible] if the corporation's will, but only in case of total income tax in-capacity of the members; that before Francis G. Baldwin should sell

or transfer her stock to any other person she would first give the members of the board a three months option to purchase it at the same price and on the same terms as such proposed sale; that if she did not sell during her lifetime, she binds her estate to grant the board, or any or either of them, an exclusive option to purchase all of her stock at a price to be fixed by the probate court of Peoria County and upon such terms as the probate judge should direct, such option to continue six months after approval of an appraisement of the stock. Joseph A. Weil took this contract to New York, where it was signed by Fannie G. Baldwin.

On December 13, 1923, three days after the date of the contract, Fannie G. Baldwin executed a new will, by which she bequeathed her household goods to appellant, and gave the residue of her estate to Joseph A. Weil, Claude U. Stone and Walter G. Causey, in trust, with directions to pay from the net income $10,000.00 per annum to appellant, and $8000.00 per annum to Frank G. Baldwin. The trust was to continue for a period of twenty years. In case of the death of either, their shares to go to their children, and if appellant had no children, her share was to go to Frank's children. The will provided that the testatrix's stock in the corporation should not be sold without giving the board of managers the first option to purchase it.

In the early part of 1925 Fannie G. Baldwin became convinced that the contract of December 10, 1923, was unfair. She consulted Claude U. Stone, and attorneys Samuel D. Weaver and Frank Quinn, both now deceased, about the matter, and retained Mr. Quinn and Shelton McGrath in connection with the cancellation of the contract and to recover from Mr. Weil any documents belonging to her or the corporation, including the stock held by him for voting purposes. This resulted in a cancellation and annulment of the contract, by a written instrument dated June 25, 1925, and

or transfer her stock to any other person she would first give the members of the board a three months option to purchase it at the same price and on the same terms as such proposed sale; that if she did not sell during her lifetime, she bids her sons to invest the board, or any or either of them, an exclusive option to purchase all of her stock at a price to be fixed by the probate court of Peoria County and upon such terms as the probate judge should direct, such option to continue six months after approval of an appraisement of the stock. Joseph A. Wall took this contract to New York, where it was signed by Frank G. Baldwin.

On December 12, 1923, three days after the date of the contract, Frank G. Baldwin executed a new will, by which she bequeathed her household goods to appellant, and gave the residue of her estate to Joseph A. Wall, Claude U. Stone and Walter S. Gamble, in trust, with directions to pay from the net income $10,000.00 per annum to appellant, and $600.00 per annum to Frank G. Baldwin. The trust was to continue for a period of twenty years. In case of the death of either, their shares to go to their children, and if appellant had no children, her share was to go to Frank's children. The will provided that the testatrix's stock in the corporation should not be sold without giving the board of managers the first option to purchase it.

In the early part of 1924 Frank G. Baldwin became convinced that the contract of December 12, 1923, was void. The associated Claude U. Stone, and attorneys Samuel D. Weaver and Frank Swim, both now deceased, about the matter, and retained Mr. Swim and Leslie Lofgren in connection with the cancellation of the contract and to recover from Mr. Wall any documents belonging to her or the corporation, including the stock held by him for voting purposes. This resulted in a cancellation of the agreement of the contract, by a written instrument dated June 20, 1924, and

the execution of a new agreement between the same parties, dated June 26, 1925, containing substantially the same provisions as the cancelled contract, except that it extended the term ten years in place of five years, and eliminated the provision for fixing the price and terms of sale by the probate court, and reserved in Fannie G. Baldwin, the right to sell the minimum amount of stock to any person or persons to enable them to qualify as directors without first giving the board of managers an option to purchase such stock.

On July 3, 1925, Fannie G. Baldwin executed a new will containing substantially the same provisions as her will of December 13, 1923, except that Frank Mulick was substituted as one of the trustees in place of Joseph A. Weil. A codicil, dated July 28, 1925, increases the annual payment to appellant out of the trust fund from $10,000.00 to $12,000.00.

Her last will and testament, dated February 7, 1931, and a codicil of November 29, 1935, were admitted to probate by the probate court of Peoria County on December 8, 1938. Claude U. Stone was named therein as executor and trustee, and was appointed by and qualified as such executor in the probate court. 798 shares of the stock claimed by appellant constitute the principal asset of her estate, as claimed by appellees. The will bequeathes all of the decedent's household goods and effects, including books, rugs, furniture, etc., to appellant. After a bequest to the care-takers of her residence, she devised and bequeathed all the residue of her estate to Claude U. Stone, in trust, with directions that 60% of the net income therefrom be paid to appellant during her lifetime, and 40% to Helen L. Baldwin and Margaret S. Baldwin, during their respective lives. The trust is to terminate twenty one years after the death of the last survivor of them. In case of the death of any of them during the trust period interim payments of the shares of those so dying, to descendants, or to survivors of the three named, are provided for. Upon the termination of the trust the corpus is to be divided among their descendants, if any, per stirpes, and if there are

the execution of a new agreement between the same parties, dated June 26, 1928, containing substantially the same provisions as the cancelled contract, except that it extended the term for a period of five years, and eliminated the provision for fixing the price and terms of sale by the trustee court, and reserved to Frank G. Baldwin, the right to sell the minimum amount of stock to any person or persons to enable them to qualify as directors without first giving the board of managers an option to purchase such stock.

On July 3, 1928, Frank G. Baldwin executed a new will containing substantially the same provisions as her will of December 13, 1925, except that Frank Mallon was substituted as one of the trustees in place of Joseph A. Vail. A codicil, dated July 23, 1928, increases the annual payment to appellant out of the trust fund from $12,000.00 to $12,000.00.

Her last will and testament, dated February 7, 1931, and a codicil of November 29, 1932, were admitted to probate by the probate court of Peoria County on December 8, 1932. Claude E. Shine was named therein as executor and trustee, and was qualified by and qualified as such executor in the probate court. 72% shares of the stock claimed by appellant constitute the principal asset of her estate, as claimed by appellees. The will bequeathes all of the testatrix's household goods and effects, including books, rugs, furniture, etc., to appellant. After a bequest to the care-takers of her residence, she devised and bequeathed all the residue of her estate to Claude E. Shine, in trust, with directions that 60% of the net income therefrom be paid to appellant during her lifetime, and 40% to Kelvin L. Baldwin and Margaret G. Baldwin, during their respective lives. The trust is to terminate twenty one years after the death of the last survivor of them. In case of the death of any of them during the trust period, their respective shares of those so dying, to descendants, or to survivors of the three named, are provided for. Upon the termination of the trust the corpus is to be divided among their descendants, if any, per stirpes, and if there

no such descendants, a Peoria church is to receive $100,000.00, and the remainder is to go to such charity or charities engaged in aiding the poor in the City of Peoria as the trustee or his successor shall select.

The cancellation of the contract mentioned and the discharge of Joseph A. Weil as attorney for the corporation and Fannie G. Baldwin marks the beginning of the ill-feeling between Mr. Weil and Mr. Stone, reflected throughout the record here. Appellant claims that Mr. Stone instigated and engineered those transactions in a scheme to obtain control of the corporation and the newspaper, in a struggle to that end between him and the board of managers.

Neither party produced any book showing the issue or transfer of any of the stock prior to December 1, 1920, when the 1000 shares were issued, as above related, except a book showing the original issue of the 250 shares upon incorporation about which there is no controversy. Appellant introduced in evidence a contract signed by her and her mother, dated February 15, 1918, substantially in the terms alleged in the complaint, and a contract of the same date, between her and Harry M. Powell, employing the latter as manager of the corporation until the death of Fannie G. Baldwin. The contract recites that appellant is the owner of all the corporate stock, subject to the life interest of her mother, and gives Mr. Powell the option to purchase fifty one per cent of the capital stock at any time after the death of Fannie G. Baldwin, with a provision that in the event of the death of Powell the contract shall terminate. A rider, signed in the name of the corporation, by Fannie G. Baldwin, president, approves the contract. It was terminated by the death of Mr. Powell on January 5, 1920. Appellant also introduced in evidence a certificate for 248 shares of the capital stock, dated February 16, 1918, with the notation thereon as alleged in the complaint. The certificate is signed by Fannie G. Baldwin, as president, and May B. Finney, as secretary.

no such recommendation. Frank chooses to be regarded $100,000.00, and the remainder is to go to such charity or charities engaged in aiding the poor in the city of Leonia as the trustee or its successor shall select.

The consideration of the contract contained and the discharge of Joseph W. Well as attorney for the corporation and Frank G. Baldwin marks the beginning of ill-feeling between Mr. Well and Mr. Stone, reflected throughout the record here. Appellant claims that Mr. Stone instigated and encouraged those transactions in a scheme to obtain control of the corporation and the newspaper, in a struggle for that and between him and the board of managers.

Neither party produced any book showing the issue or transfer of any of the stock prior to December 1, 1920, when the 100 shares were issued, as above related, except a book showing the original issue of the 280 shares upon incorporation about which there is no controversy. Appellant introduced in evidence a contract signed by her and her mother, dated February 13, 1918, substantially in the terms alleged in the complaint, and a contract of the same date, between her and Henry W. Powell, employing the latter as manager of the corporation until the death of Frank G. Baldwin. The contract recites that appellant is the owner of all the corporate stock, subject to the life interest of her mother, and gives Mr. Powell the option to purchase fifty one per cent of the capital stock at any time after the death of Frank G. Baldwin, with a provision that in the event of the death of Powell the contract shall terminate. A rider, signed in the name of the corporation, by Frank G. Baldwin, president, approves the contract. It was terminated by the death of Mr. Powell on January 6, 1920. Appellant also introduced in evidence a certificate for 248 shares of the capital stock, dated February 18, 1918, with the notation thereon as alleged in the complaint. The certificate is signed by Frank G. Baldwin, as president, and May B. Finney, as secretary.

The testimony shows that on or about February 14, 1918, appellant, Fannie G. Baldwin and Harry M. Powell went to the office of Weil and Bartley, attorneys, and held a conference in Mr. Weil's private office. Mr. Bartley was an associate, but not a partner, of Mr. Weil. They had separate private rooms. After the conference, Mr. Bartley dictated the two contracts mentioned to the stenographer, Anna Reiscz, and prepared the stock certificate for 248 shares. The next day the parties returned and had another conference with Mr. Weil in his private office. There is no testimony as to what took place at either of these conferences in Mr. Weil's private office.

Anna Reiscz testified that Mr. Bartley was present at the conferences; that as the parties came out of Mr. Weil's room after the second conference, appellant had the two contracts and the stock certificate in an envelope in her hand, and handed them to Mr. Weil, telling him to keep them for her, and that she would call for them later; that Mr. Weil kept them in a locked cabinet in his private office, and she afterward saw them there; that appellant came back about a year and a half later, got the documents and took them away with her; that she did not see Mr. Weil give them to appellant, but she came out of his room with the same envelope, and that Mr.Weil told the witness he had given them to appellant; and that thereafter she did not see them until they were returned late in 1939 or 1940 when this suit was begun.

Hildegard Lewis testified that early in December, 1919, appellant left her at the entrance of the Jefferson Building in Peoria, and asked her to wait until she went up to Mr. Weil's office on an errand; that when she returned, they went to the Baldwin home, where appellant showed her the two contracts mentioned and the stock certificate; that she did not read them, but "thumbed" through them and looked at the signatures.

The testimony shows that on or about February 14, 1910, overall-
ant, Fennie G. Eldredge and Mary E. Powell went to the office of Wall
and Bartley, attorneys, and held a conference in Mr. Wall's private
office. Mr. Bartley was not a candidate, but not a member, of Mr. Wall.
They had apparently partaken [illegible]. After the conference, Mr. Bartley
dictated the two contracts [illegible] to the stenographer, Miss Daniel,
and prepared the other certificate for the notary. The work by the
parties returned and had another conference with Mr. Wall in the
private office. There is no testimony as to what took place at either
of these conferences in Mr. Wall's private office.

Some notice testified that Mr. Bartley was present at the confer-
ence; that as the parties came out of Mr. Wall's room after the second
conference, Bartley had the two contracts and the [illegible] certificate
in an envelope in her hand, and handed them to Mr. Wall, telling him
to keep them for her, and that she would call for them later; and Mr.
Wall kept them in a locked cabinet in his private office, and he never
saw them there; that Bartley came and [illegible] a [illegible]
later, got the documents and took them away. [illegible] Mr. Wall
saw Mr. Wall give them to Bartley, but he did see [illegible]
the same envelope. [illegible] Wall [illegible] and never [illegible]
to Bartley; and that thereafter he did not see them until they were
returned [illegible] in 1909 or [illegible] [illegible].

Bartley testified that early in February, [illegible]
left her at the entrance of the Jackson Building in Omaha, and asked
her to wait until she came up to Mr. Wall's office [illegible]; that
when she returned, they went to the stenographer's [illegible] and
her the two contracts mentioned and the other certificate; that she did
not read them, but "assumed" [illegible] [illegible] the signatures.

Appellant testified that after her mother's death she searched for the contracts and certificate, and finally found them in a packet of old letters in a secret closet in the Baldwin home, known only to her and her father, and that she burned the letters. She also testified there was a secret closet in the bath room in her room, which was the normal place for the papers.

Ellen James, a close friend of appellant, testified that on appellant's request by letter, after her mother's death, she went through appellant's desk at Monhegan, Maine, and sent appellant all the papers, mostly old letters, which she found; that on a later date, in October, 1939, she was with appellant at the Baldwin home in Peoria; that appellant was searching drawers, desks, shelves and closets, and came into the room with an untied package of old letters; that while going through the package and burning letters, appellant said: "Look what I have. Here is the contract with mother and the stock certificate. I will take them right down to Joe Weil"; that the witness picked them up and looked at them, but did not read them, and was not with appellant when she found the package; that they were not in an envelope; and that appellant then left the house.

Eleanor A. Burkhart testified that on an occasion in 1920, shortly after the death of Harry M. Powell, she asked Fannie G. Baldwin if appellant was protected as to the ownership of the stock, and that Mrs. Baldwin said: "Sidney is absolutely protected. I have made all the papers to that effect"; that in the early 1920's Mrs. Baldwin had a chance to sell the Peoria Star and that she and appellant were arguing about it in the presence of the witness; that Mrs. Baldwin said: "Well, the stock is all yours, and I will be gone before you, so you decide." The witness and Kathryn Entwhistle testified that from February 15, 1918, up to the death of Fannie G. Baldwin appellant was absent from Peoria

Appellant testified that after her mother's death she searched for the certificate and certificate, and finally found them in a pocket of old letters in a secret closet in the Baldwin home, known only to her and her father, and that she burned the letters. She also testified that there was a secret closet in the back room of the house, which was the normal place for the papers.

Ellen Jones, a close friend of appellant, testified that on appellant's request by letter, after her mother's death, she went through appellant's case at Hindsgaun, Maine, and sent appellant all the papers, mostly old letters, which she found; that on a later date, in October, 1939, she was with appellant at the Baldwin home in Lewis; that appellant was searching drawers, cases, shelves and closets, and came into the room with an unsealed package of old letters; that while going through the package and burning letters, appellant said: "See what I have. Here is the document with mother and the birth certificate. I will take them right down to the hall"; that she returned later and burned at that time, but did not read them; she was not with appellant when she found the package; that they were not in an envelope; and that appellant then left the house.

Eleanor A. Burkhart testified that on an occasion in 1920, shortly after the death of Harry A. Powell, she asked Frank V. Baldwin if appellant was protected as to the ownership of the stock, and that Mr. Baldwin said: "Nothing is absolutely protected. I have made all the papers to that effect"; that in the early 1920's Mr. Baldwin had a change to sell the house over and that he and appellant were arguing about it in the presence of the witness; that Mr. Baldwin said: "Well, the stock is all yours, and I will be gone before you, as you know."

The witness and Arthur Burkhart testified that from February 15, 1933, up to the death of Frank V. Baldwin appellant was absent from Maine

most of the time, in New York, Florida and Maine.

May B. Finney testified she had made a thorough search to find any book showing the stock record prior to 1920, and had found none; that the books produced in evidence, showing stock issues and transfers since December 1, 1920, and the minutes of meetings, were all the records there were so far as she knew. It is to be noticed that the replies of appellant do not traverse the allegations of the answer that Joseph A. Weil had in his possession "all" the corporate books and records up to and including the year 1925. The replies admit he had "certain" books and records of the corporation during that time, and alleges he turned over all the books and records in his possession to Frank Quinn, attorney employed by Mrs. Baldwin at the time the contract with the board of managers was cancelled in 1925. This latter allegation raises an affirmative defense, concerning which there is no testimony to support it. Miss Finney also testified that the handwriting on the stubs of the 1000 shares of stock issued on December 1, 1920, is in the handwriting of Joseph A. Weil, except the signatures for the receipt of the certificates, and subsequent cancellation date on some of them.

The minutes of a stockholder's meeting on March 31, 1939 show that the secretary furnished a list of the stockholders, with appellant owning one share, Claude U. Stone as executor and trustee of her mother's estate 798 shares, and the other shares as shown by the record when the suit was started; and that appellant was elected as one of the directors. Miss Finney, George Z. Barnes and Claude U. Stone testified that a roll call of the stockholders as the same appeared on the record was had; that appellant was present in person, and made no protest and said nothing to anybody as to what the record showed as to the stock holdings or to the roll call taken.

most of the time, in New York, Florida and Maine.

Guy H. Finney testified he had made a thorough search to find any book showing the stock record prior to 1920, and had found none; that the books produced in evidence, showing stock issues and transfers since December 1, 1920, and the minutes of meetings, were all the records there were to be in the case. It is to be noticed that the minutes of meetings do not record the allegations of the owner that Joseph A. Voll had in his possession "all" the corporate books and records up to and including the year 1920. The public stock or his "certain" books and records of the corporation during that time, and alleges he turned over all the books and records in his possession to Frank Gulan, attorney employed by him. Gulan at the time the contract with the board of managers was consulted in 1920. This latter allegation raises an affirmative defense, concerning which there is no testimony to support it. Also Finney also testified that the undersigning on the stubs of the 1000 shares of stock issued on December 1, 1920, in the connecting of Joseph A. Voll, except the signatures for the receipt of the certificates, was subsequent consolidation date in some of them.

The minutes of a stockholder's meeting on March 31, 1925 show the secretary furnished a list of the stockholders, with appellant owning one share, Diana V. Stone as owner of twelve of her mother's estate 700 shares, and the other shares as shown by the record when the suit was started; and that appellant was elected as one of the directors. Miss Finney, George E. Barnes and Diana V. Stone testified that a roll call of the stockholders as the shares appeared on the record was had: that appellant was present in person, and made no protest and said nothing to anybody as to what the record showed as to the stock holdings or to the roll call taken.

Miss Finney further testified that the first time she ever heard of appellant's claim that she is the owner of 248 shares of the stock was in November, 1939, when her attorney appeared at the board meeting. Louis F. Proehl, an officer and director of the corporation for over 39 years, testified he had been acquainted with appellant for over thirty years and first learned of her cl im at the same meeting. Mr. Young and Charles B. Smith, a director, and connected with the corporation for 39 years, testified to the same effect.

Joseph F. Bartley, one of appellee's counsel, withdrew as such, and testified he was not present at either of the above mentioned conferences in Mr. Weil's private office; that he prepared the two contracts and the stock certificate for 248 shares in the name of appellant from information given him by Mr. Weil and pursuant to his directions; that he was not present in Mr. Weil's office on February 15, 1918, or at any other time when appellant had any of those documents in her hands and gave them to Mr. Weil, and did not see such a transaction; that he saw the stock certificate in the possession of Mr. Weil in the library of their office in the summer or fall of 1925; that it was either on the day that certain documents were turned over by Mr. Weil to the attorneys for Mrs. Baldwin and the corporation, or on the next day or so; that Mr. Weil had this stock certificate and two others, and said they were certificates for stock in the Peoria Star.

A letter dated August 29, 1925, from appellant, then in New York, to Claude U.Stone, states: "I feel very much better about things since I had that talk with you." Mr.Stone testified the letter referred to long conversations he had with her during that month, while he was visiting in New York; that at one of the conversations they talked about the contract that had been cancelled about a month previously; that in response to her inquiry, he told her the provisions of her mother's will

Miss Finney further testified that the first time she ever heard of appellant's claim that she is the owner of 240 shares of the stock was in November, 1956, when her attorney appeared at the board meeting.

Louis F. Frost, an officer and director of the corporation for over 30 years, testified he had been acquainted with appellant for over thirty years and first learned of her claim at the same meeting. Mr. Young and Charles E. Smith, a director, and connected with the corporation for 25 years, testified to the same effect.

Joseph F. Dantley, one of appellant's counsel, withdrew in each, and testified he was not present at either of the above mentioned conferences in Mr. Hall's private office; that he prepared the two contracts and the stock certificate for 240 shares in the name of Ophelia from information given him by Mr. Hall and presented to the directors; that he was not present in Mr. Hall's office on February 16, 1958, or at any other time when appellant had any of these documents in her hands and gave them to Mr. Hall, and did not see them a remember; that he saw the stock certificate in the possession of Mr. Hall in the library of their office in the manner on Feb. of 1958; that it was either on the day that certain documents were turned over by Mr. Hall to the attorneys for Mrs. Dunlavin and the corporation, or on the next day or so; that Mr. Hall had this stock certificate and the others, and said they were certificates for stock in the Sports Star.

A letter dated August 25, 1958, from appellant, then in New York, to Glenda O. Stone, stated: "I feel I my need better that things since I had that talk with you." Mr. Stone testified the letter referred to long conversations he had with her during that month, while he was visiting in New York; that one of the conversations they talked about the contracts that had been cancelled about a month previously; that in response to our inquiry, he told her the provisions of Dunlavin's will

of July 3, 1925, specifying the details of it; that Mrs. Baldwin had suggested to him that he tell appellant about the will, if he chose to do so; that he told her she had one share of the corporate stock, the board of managers and Mr. Weil 20 shares each, and that her mother had the remaining 879 shares; and that appellant made no remark except to express interest; that the next night she told him she was very happy because of what he had told her about the will and was very well satisfied and that if there were any books in the library that he wanted he could have them; that in February, 1926, appellant told him her brother Frank was getting $400.00 per month from her mother; that she was not getting her reasonable share and wanted money to buy a home on Squirrel Island, Maine; that the witness later made a deed from Fannie G. Baldwin to appellant for property at that place; Mrs. Baldwin had purchased a summer home in appellant's name on Monhegan Island, Maine, and one on Sanibel Island, Florida; that appellant had written letters to her mother with the idea of having her mother limit the amount to the grandchildren and their mother, and that he had repeatedly cautioned her she might be charged with undue influence; that at the time of Frank Baldwin's funeral he had a conversation with appellant in which she asked him what effect Frank's death would have upon her mother's will and what would become of his share; that he told her it would go to Frank's children, and she replied that they would have trouble with Frank's widow when she learned she did not get as much as appellant, and that they would have to watch out; that on December 4th, 1938, he called at the Baldwin home, and appellant asked him: "How was the Star left?"; that he told her "In trust"; then she asked who was the trustee, and when he told her he was, she replied: "Of course", and asked if she got the house; that she then called her friend Judith Waller and expressed great happiness at the information he had given her; that on the day after Mrs. Baldwin's funeral, he had another conversation with appellant; that she had with her a

of July 3, 1929, specifying the details of it, to it [illegible] Baldwin had suggested to him that he full appellant count the will. If he chose to do so; that he told her that one member of the corporate trust, the board of managers and [illegible] Trust Company, and that her mother had the remaining 75% [illegible]; and that appellant seems to express to express interest; that the next night she told him he was very happy because of what he had told her about the will and was very well satisfied and that if there was any doubt in the library that he wished he could have them; that to [illegible], 1929, appellant told him Frank was getting $400.00 per month from her mother; that he was not getting her reasonable share and wanted money to buy a home on Quimsed Island, Maine; that the witness later made a deed from Emma C. Baldwin to appellant for property at that place; Mrs. Baldwin had purchased a summer home in appellant's name on Jonesport Island, Maine, and on Sandbel Island, Florida; that appellant had written Jennings in her letter with the idea of getting her father into the mount to the proposition and their motion, and that he had repeatedly [illegible] he might be charged with undue influence; that at the time of Frank Baldwin's funeral he had a conversation with appellant in which he asked him what mother's death would have upon her mother's will and what would become of his share; that he said he did not it would go to Frank's children, and she replied that they would have trouble with Frank's widow when the learned she did not get as much as appellant, and that they would have to watch out; that on December 4th, 1928, he called at the Baldwin home, and appellant asked him: "Who was the will left?"; that he told her "Ir trust"; then she asked who was the trustee, and when he told her he was, she replied: "of course", and asked if she got the income; that she asked her friend Judith Keller she expressed great surprise at the information he had given her; that on the day after Mr. Baldwin's funeral, he had another conversation with appellant; that she was with her =

photostatic copy of her mother's last will which he had given her about December 4th, 1938, and toldhim she had read it; that he told appellant that as she was living with her mother at the time of her death, he thought she was entitled to a child's award; that they could not take out of the Star more than her mother had received, and that $1500.00 a month would be taken out and divided on a sixty-forty basis, and that she said that was satisfactory to her; that she said a friend had suggested to her that she take insurance to protect Ellen James and that Frank's daughters should take insurance for their mother, and asked the witness if he had any ideas about the library that had been left to her under the will; and that if he did not, she thought she would give it to the Bradley Polytechnic Institute; that in January, 1939, she told him she was taking steps to get insurance for the benefit of Ellen James; that under the will there was nothing to pass on; and that in the same conversation she mentioned the fact that the will provided he could name his successor as trustee, and asked him to name her. He also testified that in 1931, having heard rumors that Joseph A. Weil had possession of the old stock of the corporation, the witness had a conversation with Mrs. Baldwin, and asked her about the possibility of stock certificates being out, and what papers she had made at any time in the past; that she said nothing was ever carried out, and that in 1918 Mr. Weil and Harry Powell told her it was necessary to sign certain stock and a certain paper to carry out the provisions of the will, (evidently the will of December 15, 1915) to be kept with the will and be a part of it; that she said it was never in appellant's possession, but Mr. Weil kept it; and that when the Star was re-organized, Mr. Weil told her she would have to make a new will; that the witness saw such will in 1923. After testifying it could not be found among her papers, he testified it created a twenty year trust, with a division of the income, of 60% to

appellant and 40% to Frank Baldwin, and named Joseph A. Weil, May Finney and Roy Newton as trustees, and the first two were named as executors.

Checks in evidence disclose that Mr. Stone, as executor of Mrs. Baldwin's will, paid appellant the following sums on the following dates: December 13,1938, $300.00; $400.00 and $600.00 on December 20 and December 24, 1938, respectively; and $900.00 on the first day of each of the months of January, February, March, April and May, 1939. The record indicates that appellant's award as a child was $4000.00. Mr. Stone testified that the checks for $400.00 and $600.00 respectively, were payments on the award, and that the other payments were in anticipation of earings and dividends of the corporation, under the provisions of the will; that during the time he paid appellant $900.00 per month he also paid each of the grand-daughters $300.00 per month. These payments aggregated $1500.00 per month, to which he testified he and appellant had agreed, [redacted]

In June, 1939, the corporation owed a Peoria Bank $65,000.00. At a meeting during that month, of the bank officials and the directors of the corporation, including appellant, the bank officials insisted that the corporation was losing money, and that the operating expenses of the corporation should be reduced. They did not feel that Mr. Stone should make payments to appellant and the grand-daughters, and that salaries should be reduced. Payments to appellant and the grand-daughters were stopped, and salaries were reduced. Appellant's salary of $75.00 per week as a feature writer was reduced to $25.00. Mr. Stone testified that some times she did not write anything for the paper for two or three years, but drew her salary. Payments of $25.00 per week to

appellant and 40% to Frank Goldwin, and named Joseph G. Weil, Amy Finney and Ivy Ashton as trustees, and the first two were named as executors.

Onedia in evidence discloses that Mr. Stone, as executor of Mrs. Goldwin's will, paid appellant the following sums on the following dates: December 13, 1926, $800.00; $400.00 and $800.00 on September 20 and December 24, 1928, respectively; and $800.00 on the first day of each of the months of January, February, March, April and May, 1929. The record indicates that appellant's share of a child was $4000.00. Mr. Stone testified that the checks for $800.00 and $800.00 respectively, were payments on the award, and that the other payments were in satisfaction of earnings and dividends of the corporation, under the provisions of the will; that during the time he paid appellant $800.00 per month he also paid each of the grandchildren $200.00 per month. These payments aggregated $18[illegible].00 per month, to which he testified he and appellant had agreed. [redacted]

In June, 1929, the corporation owed a Paris bank $[illegible],000.00. At a meeting during that month, of the bank officials and the directors of the corporation, including appellant, the bank official indicated that the corporation was losing money, and that the operating expenses of the corporation should be reduced. They did not feel that Mr. Stone should make payments to appellant and the grand-daughters, and that salaries should be reduced. Payments to appellant and the grand daughters were stopped, and salaries were reduced. Appellant's salary of $75.00 per week as a feature artist was reduced to $50.00. Mr. Stone testified that he had some times he did not write anything for the paper for two or three years, but draw her salary. Payments of $25.00 per week to

each of the grand-daughters were later resumed. Numerous letters from appellant to Mr. Stone and to her mother asking for money, indicate she was frequently in debt. Mr. Stone testified that after the meeting at the bank, she continued to press him for money, and gave him a list of bills she owed, aggregating $6209.35. Some time in the latter part of the summer of 1939, one of her present attorneys asked the president of the bank if the amount appellant received from the newspaper could not be increased; and at a later conference gave him a list of the bills owed by appellant and asked him if they could not be paid with money from the Star.

Hon. Joseph E. Daily, one of the judges of the circuit court of Peoria County, testified that in the summer of 1939, he had a conversation with appellant in his chambers at the court house; that she said she was not satisfied with the money she was receiving from Mr. Stone; that she was in need of money, did not approve of his discharge of certain employees of the Star, and did not consider him a man of financial ability or who could run a newspaper; that he had had no experience and was damaging the business and the property; that she asked the witness if there was any way the court could take over the business and remove Mr. Stone as trustee; that he told her there was no way for the court to take over the management of a newspaper, but that if there was gross mismanagement, it could only be heard in court by filing a petition, and giving notice of a hearing; and that she did not mention anything about the stock.

Merle Slane, owner of the Evanston News Index, and formerly co-publisher of the Peoria Journal Transcript, testified he had known appellant for many years; that he talked with her in July, 1939, at his home in Evanston; that she said she had definitely determined to start suit to break her mother's will; that he told her it was unwise, and

each of the grand-daughters was later received. Numerous letters from applicant to Mr. Stone and to her mother asking for money, indicate she was frequently in debt. Mr. Stone testified that after the meeting at the bank, she continued to press him for money, and gave him a list of bills she owed, aggregating $2800.00. Some time in the latter part of the summer of 1919, one of her present Attorneys asked the president of the bank if the amount applicant received from her newspaper could not be increased; and at a later conference gave him a list of the bills owed by applicant and asked him if they could not be paid with money from the bank.

Hon. Joseph E. Daly, one of the judges of the circuit court of Peoria County, testified that in the summer of 1920, he had a conversation with applicant in his chambers at the court house; that she said she was not satisfied with the money she was receiving from Mr. Stone; that she was in need of money; that she approve of his giving certain employees of the bank, and did not consider him a man of honorable character; that she could run a newspaper; that he had been acquainted and was dealing the business and the property; that she asked the witness if there was any way the court could take over the business and remove Mr. Stone as trustee; that he told her there was no way for the court to take over the management of a newspaper, but that if there was gross mismanagement, it could only be done in court by filing a petition, and giving notice of a hearing; and that she did not mention anything about the stock.

Frederick Stone, owner of the Evening Star, and formerly co-publisher of the Peoria Journal Transcript, testified he had known applicant for many years; that he talked with her in July, 1920, at her home in Pawnee; that she said she had definitely determined to start suit to break her mother's will; that he told her it was useless, and

he thought there was an easier way out; that Mr. Weil had told him he had in his possession the old stock of the Star in appellant's name; that if that were true, she would not have to go through a long series of trials on the breaking of wills; and that she made no reply. He also testified that Mr. Weil told him in the latter's office in 1929 or 1930 that he had in his possession the old Star stock in appellant's name, and asked the witness if he would be interested in a managerial position in the Star if Mr. Weil wanted to use him there; that in January, 1939, he had another conversation with Mr. Weil at the Jefferson Hotel in Peoria; that Mr. Stone passed through the lobby and Mr. Weil said to the witness: "Well, Merle, some day I am going to get that boy. You know I have the old stock of the Star and that is my ace in the hole." Appellant and Mr. Weil admitted having conversations with the witness, but denied that the things to which he testified were said.

A letter of July 15, 1925, from appellant to Mr. Stone, says: "When the transfer of the stock was made to the Board of Managers they were to have two shares of stock. Where in the world did that hundred shares come in. This thing has certainly been handled in about as unbusiness-like manner as possible." Mr. Stone testified that he wrote her in reply that the managers were each to have two per cent of the stock, or twenty shares each. The record shows no further inquiry or protest by her as to the issue of the 100 shares to the members of the board of managers. Another letter from appellant to Mr. Stone, of April 21, 1933, says she wishes something could be done or had been done about re-purchasing the stock of one of the board of managers who had just died (Roy Newton); that it brought in a foreign influence, and there should have been an arrangement so that the stock could be bought back by the owners of the paper at the death of the original owner.

he thought there was an easier way out; that Mr. Weil had told him he had in his possession the old stock of the Star in complainant's name; that if that were true, she would not have to go through a long series of trials on the breaking of wills; and that she made no reply. He also testified that Mr. Weil told him in the latter's office in 1929 or 1930 that he had in his possession the old Star stock in complainant's name, and asked the witness if he would be interested in a managerial position in the Star if Mr. Weil wanted to use him there; that in January, 1929, he had another conversation with Mr. Weil at the Jefferson Hotel in Peoria; that Mr. Stone passed through the lobby and Mr. Weil said to the witness: "Well, Hello, some day I am going to get that boy. You know I have the old stock of the Star and that is my ace in the hole." Complainant said Mr. Weil admitted having conversations with the witness, but denied that the things to which he testified were said.

A letter of July 12, 1928, from complainant to Mr. Stone, says: "Now the transfer of the stock was made to the board of managers they were to have two shares of stock. Where in the world did that hundred shares come in. That thing has certainly been handled in some unmentionable manner as possible." Mr. Stone testified that he wrote her in reply that the managers were each to have two per cent of the stock, or twenty shares each. The record shows no further inquiry or protest by her as to the issue of the 100 shares to the members of the board of managers. Another letter from Complainant to Mr. Stone, of April 21, 1931, says she wishes something could be done or had been done about re-purchasing the stock of one of the board of managers who had just died (Lewis); that it brought in a foreign influence, and there should have been an arrangement so that the stock could be bought back by the owners of the paper at the death of the original owner.

Still another letter from appellant to her mother, dated October 20, 1936, states: "Mr. Potter who called on you to buy the Star called on me yesterday. He was in earnest. * * * He expected to find a flibberty jibbert who would not be interested in the paper, but I told him you were the owner and what you said went, and that was that."

Letters to appellant from Mr. Stone on June 24 and June 25, 1925, advised her of the terms of the cancelled contract between her mother and the board of managers, and the new contra ct giving them the option to purchase the stock of the corporation. Her reply, of June 27, 1925, and a letter to her mother in the same month, disclose that she made no objections or protest about the option to purchase, given by her mother, and said only that she did not like the ten year extension, but that those in power could always handle the situation if necessary.

On June 12, 1931, appellant wrote Mr. Stone regarding an audit. The letter says: "It is a justifiable expense; but whenever I mention the Star or the manner of its conduct, mother has always turned a deaf ear, and after all, it was her paper, and she was entitled to do as she liked."

By a letter of July 2, 1925, from appellant to her mother, she suggested the discharge of Mr. Weil from any connection with the paper, in terms very disparaging to his integrity.

Helen L.Baldwin, Margaret S. Baldwin, and their mother testified that at the time of the funeral of Fannie G. Baldwin, appellant said she was satisfied with the will, and the management being in Mr. Stone's hands; that she advised the two girls to take out insurance naming their mother as beneficiary, as in the event of their death she would have no share in the estate. Their mother also testified that appellant said she was taking like action for her friend, Miss James, for the same reason. Margaret S. Baldwin also testified that appellant said nothing about

Still another letter from appellant to her mother, dated October 30, 1926, states: "Mr. Potter who called on you to buy the stock called on me yesterday. He was in earnest. " " " He expected to find a flibbertigibbert who would not be interested in the paper, but I told him you were the owner and that you said want, and that was that."

Letters to appellant from Mr. Stone on June 24 and June 25, 1928, advised her of the terms of the concealed contract between her mother and the board of regents, and the new course of giving them the option to purchase the stock of the corporation. Her reply, of June 27, 1928, and a letter to her mother in the same month, disclose that she made no objections or protest about the option to purchase, given by her mother, and said only that she did not like the ten year extension, but that those in power could always handle the situation if necessary.

On June 12, 1931, appellant wrote Mr. Stone regarding an audit. The letter says: "It is a justifiable expense; but whenever I mention the fact or the manner of its conduct, mother has always turned a deaf ear, and after all, it was her paper, and she was entitled to do as she liked."

By a letter of July 6, 1932, from appellant to her mother, she suggested the discharge of Dr. Hall from any connection with the paper, in terms very disparaging to his integrity.

Helen L.Baldwin, Margaret S. Baldwin, and their mother testified that at the time of the funeral of Francis J. Baldwin, appellant said she was satisfied with the will, and the arrangement being in Mr. Stone's hands; that she advised the two girls to take out insurance naming their mother as beneficiary, as in the event of their death she would have no share in the estate. Their mother also testified that appellant said she was taking like action for her friend, Miss James, for the same reason. Margaret S. Baldwin also testified that appellant said nothing about

stock ownership; and that later she met appellant in Chicago in the fall of 1939, and that appellant talked about breaking the will, and nothing else. On March 9, 1939, appellant wrote the grand-daughters a letter in which she said: "I hope you've put your insurance through. Don't forget what I told you. As things stand now, we three are the only ones concerned with the terms of the will, at the death of any one of us - the other two divide that income. You cannot protect your mother, your husband nor your children except by insurance."

Frederick R. Oakley, editor of the Peoria Star, testified that after the death of Fannie G. Baldwin appellant called him to her home and told him: "Bill, I want you to know that was my mother's will," and that further statements by her indicated she was satisfied with it. Appellant denied practically everything testified to by the witnesses for appellees so far as it concerned her.

Federal income tax returns of the corporation for the years 1918, 1919, the amended return for the year 1920, and the return for 1921, each show Fannie G. Baldwin as the owner of all the shares of stock. The first two were executed by Fannie G. Baldwin, as president, and M. B. Finney, as treasurer. The last two were executed by Joseph A. Weil, as vice-president and May B. Finney, as treasurer.

The corporation records show that appellant executed waivers of notice of stockholders' meetings held on October 4, 1920, and July 11, 1925; waivers of notice of directors' meetings held on October 1, 1920, November 22, 1920, February 21, 1929 and March 31, 1939. The same records show that all the stockholders were present in person or represented at stockholders' meetings on November 22, 1920, July 11, 1925, July 29, 1926, July 12, 1927, January 6,1928, February 21, 1929, and June 26, 1931. For the stockholders' meetings on January 6, 1928, February 21, 1929 and

stock overseas; and that later she met appellant in Chicago in the fall of 1929, and that appellant talked about breaking the will, and nothing else. On March 9, 1929, appellant wrote the grand-daughters a letter in which she said: "I have you've cut your insurance through. Don't forget what I told you. We things stand now, we three are the only ones concerned with the terms of the will, at the death of any one of us - the other two divide that income. You cannot protect your mother, your husband nor your children except by insurance."

Frederick K. Oakley, editor of the Peoria Star, testified that after the death of Fannie G. Baldwin appellant called him to Peoria and told him: "Bill, I want you to know that was my mother's will," and that further statements by her indicated she was satisfied with it. Appellant denied practically everything testified to by the witnesses for appellees so far as it concerned her.

Federal income tax returns of the corporation for the years 1918, 1919, the amended return for the year 1920, and the return for 1921, each show Fannie G. Baldwin as the owner of all the shares of stock. The first two were executed by Fannie G. Baldwin, as president, and M. H. Finney, as treasurer. The last two were executed by Joseph A. Vail, as vice-president and Jay B. Finney, as treasurer.

The corporation records show that appellant executed waivers of notice of stockholders' meetings held on October 4, 1920, and July 12, 1922; waivers of notice of directors' meetings held on October 1, 1920, November 23, 1920, February 21, 1929 and March 31, 1929. The same records show that all the stockholders were present in person or represented at stockholders' meetings on November 23, 1920, June 11, 1922, July 29, 1929, July 12, 1927, January 8,1928, February 21, 1929, and June 22, 1921. For the stockholders' meetings on January 8, 1928, February 21, 1929 and

June 26, 1931, appellant executed proxies stating she was the owner of one share of stock. Although she was absent from Peoria the most of the time from 1918 up to her mother's death, the above facts detract from her claim that she did not know the activities of the corporation during that period. Furthermore, the law imposed upon her as a director, the duty to inform herself and to know the corporate business and affairs.

There was inventoried in the estate of appellant's father a library in the home, of approximately 3000 volumes, appraised, with book cases, at $10,000.00. Mr. Stone testified appellant made no objection to the inventory. The will of appellant's father ~~the decedent~~ left all of his property to Fannie G. Baldwin. Her will bequeathed to appellant her furniture, books, etc. Appellant testified the library was hers, given to her by her father. Charles B. Smith and Eleanor Burkhart each testified in substance that Mrs. Baldwin told the witness the library was appellant's, but the latter testified that on another occasion they were talking about the opera, and Mrs. Baldwin then gave her all those sets; that she did not take them away because she did not have a proper place for them, but re-produced and sold the steel engravings. During Mrs. Baldwin's lifetime she gave Mr. Stone several sets of the books. The second appraisement bill in her estate listed and valued the books and after her death, appellant gave Mr. Stone other sets of the books, and gave the remainder to the Bradley Polytechnic Institute of Peoria. Although appellant testified she never saw the appraisement bill in her mother's estate, we think the facts show her source of title was through her mother's will, and ~~are another indication~~ that she adopted the provisions thereof intentionally and understandingly until her income from the trust was stopped.

June 30, 1921, appellant executed proxies at time she was the owner of one share of stock. Although she was absent from Paris the most of the time from 1918 up to her mother's death, the above facts detract from her claim that she did not know the activities of the corporation during that period. Furthermore, the law imposed upon her as a director, the duty to inform herself and to know the corporate business and affairs.

There was inventoried in the estate of appellant's father a library in the amount of approximately 8000 volumes, contained, with book cases, at $10,000.00. Mr. Stone testified appellant made no objection to the inventory. The will of appellant's father left all of his property to Fannie G. Baldwin. Her will bequeathed to appellant her furniture, books, etc. Appellant testified the library was given to her by her father. Charles H. Smith and Eleanor Hubbard each testified in substance that Mrs. Baldwin told the witness the library was appellant's, but the latter testified that on another occasion they were talking about the cases, and Mrs. Baldwin gave her all there was; that she did not take them away because she did not have a proper place for them, but re-produced and said she about everything. During Mrs. Baldwin's lifetime she gave Mr. Stone several sets of the books. The second supplement bill in her estate listed and values the books and after her death, appellant gave Mr. Stone sets of the books, and gave the remainder to the Bradley Polytechnic Institute of Peoria. Although appellant testified she never saw the supplement bill in her mother's estate, we think the facts show her source of title was through her mother's will, and [redacted] that she accepted the provisions thereof intentionally until her income from the trust was stopped and [redacted] until her income from the trust was stopped.

Although Mr. Weil denied making the statements attributed to him by the witness Merle Slane, he did not testify that he had turned over all the books, records and documents in his possession, or that he did not have in his possession the certificate for 248 shares of stock on the occasions mentioned by Mr. Slane and Mr. Bartlett. No person present at the signing of the two contracts and the stock certificate in his office testified to any fact or circumstances at the time they were signed. Nobody testified that Fannie G. Baldwin ever delivered any certificate for 250 shares of stock to appellant, or that appellant delivered such certificate for cancellation, or that the certificate for 248 shares was delivered to appellant by anybody authorized to do so. Mr. Stone's testimony shows that Mrs. Baldwin understood the contract with appellant and the stock certificate for 248 shares were to be kept with her will and be a part thereof. Nobody testified to the contrary. These facts were peculiarly within the knowledge of Mr. Weil and there is no showing that the transaction was a privileged communication. He was a competent witness. (Oard v. Dolan, 320 Ill. 371; Dickerson v. Dickerson, 322 id. 492.) The well recognized rule is that where a party alone possesses information concerning a disputed fact and fails to bring forward that information, a presumption arises in favor of his adversary's claim of fact. (Belding v. Belding, 358 Ill. 216; Prudential Insurance Co. v. Bass, 357 id. 72.)

To enable plaintiff to recover in this case it was incumbent upon her to establish there was an absolute and irrevocable gift inter vivos of the stock to her by her mother; that the donor had parted with her dominion and control of the stock; and that there had been such a delivery to appellant as to put it out of the power of her mother to repossess herself of the property given. (Suchy v. Hajicek, 364 Ill. 502; People v. Csontos, 275 id. 402.) The burden of proving the alleged gift

Although Mr. Hall denied making the statements attributed to him by the witness Merle Blane, he did not testify that he had turned over all the books, records and documents in his possession, or that he did not have in his possession the certificate for 248 shares of stock on the occasions mentioned by Mr. Blane and Mr. Bartlett. No person present at the signing of the two contracts and the stock certificate in his office testified to any fact or circumstance at the time they were signed. Nobody testified that Merle C. Reighin ever delivered any certificate for 248 shares of stock to appellant, or that appellant delivered such certificate for cancellation, or that the certificate for 248 shares was delivered to appellant by anybody authorized to do so. Mr. Stone's testimony alone that Reighin had restored the contract with appellant and the stock certificate for 248 shares were to be kept with her still and be a part thereof. Nobody testified to the contrary. These facts were peculiarly within the knowledge of Mr. Hall and there is no showing that the transaction was a privileged communication. He was a competent witness. (Ward v. Dolan, 220 Ill. 371; Dickerson v. Dickerson, 332 Id. 492.) The well recognized rule is that where a party alone possesses information concerning a disputed fact and fails to bring forward that information, a presumption arises in favor of his adversary's claim of fact. (Peabody v. Hoskins, 188 Ill. 414; Prudential Insurance Co. v. Bass, 327 Id. 72.)

In order plaintiff to recover in this case it was incumbent upon her to establish there was an absolute and irrevocable gift inter vivos of the stock to her by her mother; that the donor had parted with her dominion and control of the stock; and that there had been such a delivery to appellant as to put it out of the power of her mother to repossess herself of the property given. (Muchy v. Dujicek, 364 Ill. 508; People v. Chapoton, 376 Id. 402.) The burden of proving the alleged gift

is on the donee who must prove all the facts essential to a valid gift, and the great weight of authority is that the proof to sustain the gift must be clear and convincing. (Rothwell v. Taylor, 303 Ill. 226; Bolton v. Bolton, 306 id. 473.) Mere possession of property by one claiming it as a gift, after the death of the alleged donor, is universally held to be insufficient to prove a valid gift. (Rothwell v. Taylor, supra; People v. Polhemus, 367 id. 185.)

Under the evidence and the applicable law, the chancellor was right in holding that appellant failed to establish her right to the 248 shares of stock, and it follows, of course, that she is not entitled to the dividend stock of 744 shares. The decree dismissing the complaint for want of equity was correct, and is accordingly affirmed.

Decree affirmed.

is on the donee who must prove all the facts essential to a valid gift, and the great weight of authority is that the proof to establish the gift must be clear and convincing. (Lothrell v. Taylor, 305 Ill. 229; Dolton v. Dolton, 309 Id. 473.) Here possession of property by one claiming it as a gift, after the death of the alleged donor, is universally held to be insufficient to prove a valid gift. (Lothrell v. Taylor, supra; People v. Pierson, 307 Id. 158.)

Under the evidence and the applicable law, the chancellor was right in holding that complainant failed to establish her right to the 248 shares of stock, and it follows, of course, that she is not entitled to the dividend stock of 744 shares. The decree dismissing the complaint for want of equity was correct, and is accordingly affirmed.

Decree affirmed.

GEN. NO. 9810 Abstract AGENDA NO. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942

ELMER J. HUMBERT, as Administrator of the Estate of John Elmer Humbert, Deceased, Appellee vs. FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Chicago, Rock Island and Pacific Railway Company, a corporation, Appellants	APPEAL FROM CIRCUIT COURT OF HENRY COUNTY.

DOVE, J.:

This is an appeal from a judgment of the circuit court of Henry County for $4800.00 on a verdict in favor of appellee against appellants, trustees of the Chicago, Rock Island and Pacific Railway Company, on account of the alleged wrongful death of appellee's intestate in a collision between the decedent's automobile and the locomotive of appellant's passenger train at a grade crossing on State Street in the business district of the City of Geneseo, at about 3:00 o'clock A. M., December 15, 1940.

State Street runs north and south. The railroad crosses it in a slightly northwest and southeast direction at an angle of 15°, 34'. The street is about sixty feet wide, and the distance between the curbs is 51.5 feet. The railroad right-of-way is one hundred feet wide, with

GEN. NO. 9810 ABSTRACT NUMBER NO. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1940

ELMER J. HOBART, as administrator of the estate of John Oliver Hobart, Deceased, Appellee, vs. FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. ELKINS, Trustees of the Chicago, Rock Island and Pacific Railway Company, a corporation, Appellants	ERROR TO CIRCUIT COURT OF HENRY COUNTY.

DOVE, J.:

This is an appeal from a judgment of the circuit court of Henry County for $4800.00 on a verdict in favor of appellee against appellants, trustees of the Chicago, Rock Island and Pacific Railway Company, on account of the alleged wrongful death of appellee's intestate in a collision between the decedent's automobile and the locomotive of appellant's passenger train at a grade crossing on State Street in the business district of the City of Geneseo, at about 3:00 o'clock A. M., December 15, 1940.

State Street runs north and south. The railroad crosses it in a slightly northwest and southeast direction at an angle of 15°, 24'. The street is about sixty feet wide, and the distance between the curbs is 51.5 feet. The railroad right-of-way is one hundred feet wide, with

four tracks crossing the street, the south one of which is the east bound track, the next one north is the west bound track, and the others are switch tracks. There are crossing gates, operated by a lever, on each side of the tracks, and a crossing bell, operated by a cord, with twenty-four hour watchman service. The gates and bell are manually operated by the watchman from a shanty south of the tracks on the west side of the street. The decedent's automobile was going north on State Street. He sat on the front seat with Owen H. Whitted, who was driving. As they reached the west bound railroad track, a fifteen car through passenger train from the east struck the automobile about its center and both men were killed. They and the automobile were carried on the front of the locomotive to the place where the locomotive stopped which was about three quarters of a mile farther on.

The complaint alleges due care and caution on the part of plaintiff's intestate; that the view of trains coming from the southeast is obstructed by buildings extending to, or nearly to and upon, the railroad right-of-way; that by reason of the frequent movement of trains and the obstructed view, the crossing is hazardous and unusually dangerous, in recognition whereof the defendants maintained the gates and kept a watchman there and that their so doing was well known to the public and to plaintiff's intestate. This is followed by allegations of negligence in operating the train at a high, reckless and dangerous speed, having no regard for the safety of others, with no bell ringing, whistle sounding, or other warning given; and in negligently failing to lower the gates until the decedent's automobile had entered upon the crossing directly in the path of the train.

The answer denies the allegations of due care and caution, obstructed view, and the alleged acts of negligence, and alleges, on information and belief, that Whitted was driving the automobile under the guidance, direction and control of appellee's intestate; that the latter's death

four tracks crossing the street, the south one of which is the east bound track, the next one north is the west bound track, and the others are switch tracks. There are crossing gates, operated by a lever, on each side of the tracks, and a crossing bell, operated by a cord, with twenty-four hour watchman service. The gates and bell are normally operated by the watchman from a shanty south of the tracks on the west side of the street. The decedent's automobile was going north on state street. He sat on the front seat with Owen H. Whitted, who was driving. As they reached the west bound railroad track, a fifteen car through passenger train from the east struck the automobile about its center and both men were killed. They and the automobile were carried on the front of the locomotive to the place where the locomotive stopped which was about three quarters of a mile further on.

The complaint alleges due care and caution on the part of plaintiff's intestate; that the view of trains coming from the westward is obstructed by buildings extending to, or nearly to and upon, the railroad right-of-way; that by reason of the frequent movement of trains and the obstructed view, the crossing is hazardous and unusually dangerous, in recognition whereof the defendants maintained the gates and kept a watchman there and that their so doing was well known to the public and to plaintiff's intestate. This is followed by allegations of negligence in operating the train at a high, reckless and dangerous speed, having no regard for the safety of others, with no bell ringing, whistle sounding, or other warning given; and in negligently failing to lower the gates until the decedent's automobile had entered upon the crossing directly in the path of the train.

The answer denies the allegations of due care and caution, obstructed view, and the alleged acts of negligence, and alleges, on information and belief, that Whitted was driving the automobile under the guidance, direction and control of appellee's intestate; that the latter's death

was the direct and proximate result of his own negligence and failure to exercise due care and caution for his own safety; that the defendants, through their servants, gave ample notice and warning of the approach of the train, and that plaintiff's intestate, in entering upon the tracks, assumed the risk of any injury; and that he was violating the provisions of the statute, (Ill. Rev. Stat. 1941, chap. 95½, sec. 146a) by allowing the operator of the automobile to drive at a speed greater than was reasonable and proper in regard to the traffic and use of the way, and like provisions of an ordinance of the City of Geneseo.

A wilful and wanton charge in the complaint was stricken on motion confessed by the plaintiff, and the cause was consolidated with a suit by the administrator of Whitted's estate. At the close of the testimony for the plaintiff, the railroad company, on its motion, was dismissed out of the suit.

East of State Street the railroad runs straight for a distance of four miles. There is a police station on the east side of the street south of the tracks. It is ten feet wide north and south and twenty feet long east and west. South of the police station is an alley eleven feet wide. South of the alley eleven feet wide. South of the alley the east side of the street is built up solid. The northeast corner of the police station is 33.1 feet south of the center of the west bound track. Measuring south along the center line of the street from the center of the west bound track, it is 48.5 feet to a point directly west of the north wall of the police station; 60.6 feet to a point west of the north side of the alley; and 72.5 feet to a point west of the south side of the alley. Looking east from the center line of the street, the railroad tracks are visible for the following distance: Through the north side of the alley on a line .6 of a foot south of the south wall of the police station, 960 feet, except that portion of the tracks obscured by

was the direct and proximate result of his own negligence and failure to exercise due care and caution for his own safety; that the defendants, through their servants, gave ample notice and warning of the approach of the train, and that plaintiff's intestate, in entering upon the tracks, assumed the risk of injury; and that he was violating the provisions of the statute, (III. Rev. Stat. 1911, chap. 95, sec. 165a) by allowing the operator of the automobile to drive at a speed greater than was reasonable and proper in regard to the traffic and use of the way, and like provisions of an ordinance of the city of Geneva.

A writ and warrant charge in the complaint was stricken on motion confessed by the plaintiff, and the cause was consolidated with a suit by the administrator of Whitted's estate. At the close of the testimony for the plaintiff, the railroad company, on its motion, was dismissed out of the suit.

East of State street the railroad runs straight for a distance of four miles. There is a police station on the east side of the street south of the tracks. It is ten feet wide north and south and twenty feet long east and west. South of the police station is an alley eleven feet wide. South of the alley eleven feet wide. South of the alley the east side of the street is built up solid. The northeast corner of the police station is 55.1 feet south of the center of the west bound track. Measuring south along the center line of the street from the center of the west bound track, it is 48.5 feet to a point directly east of the north wall of the police station; 60.6 feet to a point west of the north side of the alley; and 72.8 feet to a point west of the south side of the alley. Looking east from the center line of the street, the railroad tracks are visible for the following distance: Through the north side of the alley on a line .5 of a foot south of the south wall of the police station, 880 feet, except that portion of the tracks obscured by

the police station; from a point thirty three feet south of the center of the west bound track, 1600 feet; and from a point twenty five feet south of the center of the same track, 2585 feet. From the west bound track a train or the head light of a train can be seen the whole four miles.

The street was well lighted at the railroad crossing, with four street lights in the immediate vicinity north and south of the tracks, and there was no snow or ice on the pavement. There are three windows in the police station one near each of the northwest and southwest corners, and one about the middle of the north side. The door in the west has a glass upper panel.

Plaintiff's intestate was familiar with the conditions and surroundings, having been for some months a tank wagon driver for the proprietor of a bulk gasoline business, and having frequently delivered gasoline to the filling station just north of the railroad tracks. Whitted was also familiar with the conditions and surroundings. He was employed in two restaurants, and frequented the police station, staying some nights from midnight until late the next morning. He was very deaf, so much so that his nickname indicated his infirmity.

The regular speed of the train through Geneseo was seventy miles per hour. On the occasion of the accident it was traveling at about its usual speed, or a little more, having lost twenty three minutes at Ottawa, due to waiting for an ambulance to take a sick passenger off the train, and had made up about five minutes of the lost time. The locomotive was equipped with an electric head light, and the engineer could see 1000 to 1200 feet ahead. The whistle was blown for crossings east of State Street, and between State Street and the depot, one block east, it was blown three times, and was blowing when it struck the decedent's automobile. The bell was ringing continuously from the time the train left

the police station; from a point thirty three feet south of the center of the west bound track, 1000 feet; at from a point twenty five feet south of the center of the same track, 2525 feet. From the west bound track a train or the head light of a train can be seen two whole four miles.

The street was well lighted at the railroad crossing, with four street lights in the immediate vicinity north and south of the tracks, and there was no snow or ice on the pavement. There are three windows in the police station one near each of the northwest and southwest corners, and one about the middle of the north side. The door in the west has a glass upper panel.

Plaintiff's intestate was familiar with the conditions and surroundings, having been for some months a truck driver for the proprietors of a bulk gasoline business, and having frequently delivered gasoline to the filling station just north of the railroad tracks. Intestate was also familiar with the conditions and surroundings. He was employed in the restaurants, and frequented the police station, staying some nights from midnight until late the next morning. He was very deaf, so much so that his misfortune indicated his infirmity.

The regular speed of the train through Geneseo was seventy miles per hour. On the occasion of the accident it was travelling at about its usual speed, or a little more, having lost twenty three minutes at Ottawa, due to waiting for an embankment to take a slow passenger off the train, and had made up about five minutes of the lost time. The locomotive was equipped with an electric head light, and the engineer could see 1000 to 1200 feet ahead. The whistle was blown for crossings east of State Street, and between State Street and the depot, one block east, it was blown three times, and was blowing when it struck the decedent's automobile. The bell was ringing continuously from the time the train left

Bureau. Both the whistle and the bell were loud sounding.

Shortly before the accident, William Daniels, Whitted and plaintiff's intestate came out of a restaurant on State Street in the second block south of the railroad. Whitted and plaintiff's intestate got into the front seat of the latter's car, Whitted taking the driver's seat. Daniels was the first to leave, going north in his car. He testified that he was driving between fifteen and twenty miles an hour, and did not look back until he had crossed the railroad tracks, and then saw the decedent's car coming near the stop light at First Street, about two hundred feet south of the tracks, but could not tell whether it was coming fast or slow; that the gates were up, and as he got on the tracks he saw the train coming approximately 1200 feet away. This distance agrees with the testimony of the engineer and fireman as to their seeing him cross the tracks.

Fred Fricke, a merchant police, and Clayton Jaquet, night patrolman, were sitting in the police station. Fricke was near the southwest window and Jaquet near the north window. Each testified to seeing the lights of the decedent's automobile as it went by the station, and the reflection of the head light of the train. Fricke testified he saw the collision and that he and Jaquet ran across the street to the watchman's shanty; that the gates were up and did not come down at any time, but after the collision they came down a trifle; that he asked Lawrence Oberle, the watchman: "Mike, what in the world is wrong?" to which Oberle replied: "I guess this is the pen for me." On cross examination he said he did not pay any attention to the gates, and could not say whether they were up or down, - that he didn't go down there to see. On redirect examination he said he wanted to make a correction in his testimony, and reaffirmed his first statement that the gates were up, and were not down at any time. Both Fricke and Jaquet testified that when they first saw Oberle he was standing with one hand on the gate lever and the other hand on the bell cord.

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Oberle testified he saw the train coming about two miles east, and received signals of its approach when it was about a mile away; that at that time he started lowering the gates, but let a car through from the north, and then started ringing the crossing bell and lowered the State Street gates, and then the Center Street gates, one block west; that when he got the State Street gates down the train was between there and the depot, and that it went through before he started to raise the gates; that he did not see the collision but heard the crash, and did not see any automobile coming from the south; that after the accident he raised the gates and stepped outside. He denied making the statement testified to by Fricke, or saying anything to him, and testified that Fricke never speaks to him, and that they had not talked to each other for three or four years.

Jaquet testified the train whistle first attracted his attention, and he could see the reflection of the head light on the tracks a long way back, and that it was visible at the crossing; that he had driven an automobile for thirty years and had observed the speed at which they travel; that he saw the lights of the decedent's automobile as it approached the crossing, and that in his opinion it was traveling between forty-five and fifty miles an hour; that he did not see the collision but heard the crash, and ran across to the shanty, but could not tell whether the gates had been up or down; that they were about three quarters of the way up. and the top of the gate was moving. His further testimony tends to corroborate Oberle's denial of the conversation to which Fricke testified.

Both the engineer and the fireman of the train saw the Daniels car cross the tracks about 1200 feet away. The fireman, who sat on the left hand side of the locomotive cab, saw the decedent's car lights as it passed the alley, and as it went onto the crossing. His estimate of

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its speed, to which he testified, from observation of train speedometers while watching automobiles traveling parallel with the train, was that decedent's car was traveling about forty miles an hour, - not less than that. The engineer, who sat on the right hand side of the cab, did not see the decedent's car before it was struck. None of the witnesses, except Oberle, testified to seeing any antomobile coming from the north.

The statute invoked by appellants, and the ordinance of the City of Geneseo which was introduced in evidence, each provides that no person shall drive a motor vehicle, such as decedent's car, upon any public highway at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person; and makes a rate of speed exceeding twenty miles per hour through the business district of any city prima facie evidence of a violation of those provisions.

As a general rule of law, it may be conceded, as claimed by appellee, that where a railroad maintains gates or other safety devices at a crossing, it assumes the duty to use due care in their operation, and a failure to do so may constitute negligence. It is also an elementary principle of the law that in a case of this kind, the burden of proof is on the plaintiff, not only to show that the injury was produced by the negligence of the defendant, but also that the plaintiff's intestate was in the exercise of due care and caution for his own safety. (Dyer v. Talcott, 16 Ill. 300; Casey v. Chicago Railway Co., 269 id. 386, 390, 391). A railroad crossing is a dangerous place, and one who approaches it must use the care and caution commensurate with the known danger. Failure to use ordinary precaution in such cases is condemned as negligence. (Grubb v. Illinois Terminal Co., 366 Ill. 330, 338 and cases cited.) In this case the complaint alleges the crossing is unusually dangerous. Disregarding the conflict

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in the testimony as to whether the gates were up or down, and assuming they were up, as appellee claims, the question remains whether he has met the burden of proving the necessary element that his intestate was in the exercise of due care and caution for his own safety.

The law as to the speed of trains is well settled. The public interest requires, and the law permits, that passenger trains may be operated at such speeds as may be consistent with a due regard for the safety of persons who are, in the exercise of due care for their own safety, traveling on the highways over and across railroad tracks. (Provenzano v. Illinois Central Railroad Co., 357 Ill. 199, 196; Grubb v. Illinois Terminal Co., supra, 337; Chicago and Northwestern Railroad Co. v. Dunleavy, 129 id. 132; Partlow v. Illinois Central Railroad Co., 150 id. 321.) These cases all embrace the element of due care on the part of the plaintiff, or his intestate, as a prerequisite to recovery.

In the Grubb case, supra, it was contended that where a flash or wigwag signal had been established, a person about to cross the railroad track had a right to rely on the fact that the signal is not indicating danger and to assume therefrom that no train is coming; that the traveler has a right to be guided by the warning usually employed and the fact that it was not flashing, and where he, relying on that fact, relaxes his usual caution, he cannot be held guilty of contributory negligence because of such reliance. After reviewing and analyzing several cases from other jurisdictions, the court said in the opinion (p. 337): "No fixed or positive rule applicable to all cases can be announced. It must be remembered that railroads, of necessity, are operated at a high rate of speed in accordance with public demand; that they proceed over their own right-of-way and that the mechanical devices installed to warn the public of approaching trains may get out of order. We believe the sound rule to be, that although the fact that a signal system is not

in the testimony as to whether the gates were up or down, and whether they were up, as appellee claims, the question remains whether he met the burden of proving the necessary element that his intestate was in the exercise of due care and caution for his own safety.

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In the Grubb case, supra, it was contended that where a flagman or signal had been established, a person about to cross the railroad track had a right to rely on the fact that the signal is not indicating danger and to assume therefrom that no train is coming; that the traveler has a right to be guided by the warning usually employed and the fact that it was not flashing, and where he, relying on that fact, relaxes his usual caution, he cannot be held guilty of contributory negligence because of such reliance. After reviewing and analyzing several cases from other jurisdictions, the court said in the opinion (p. 327): "No fixed or positive rule applicable to all cases can be announced. It must be remembered that railroads, of necessity, are operated at a high rate of speed in accordance with public demand; that they proceed over their own right-of-way and that the mechanical devices installed to warn the public of approaching trains may get out of order. We believe the sound rule to be, that although the fact that a signal system is not

operating is an indication to the traveler that it is safe to cross, nevertheless he is not thereby released of the duty of using reasonable care for his own safety. Where the surroundings at a particular crossing give to the traveler an unobstructed view of a dangerous highway crossing he is not justified in failing to look, or, on looking, failing to see an approaching train, merely acting in reliance upon an assumption that no train is approaching. The law will not tolerate the absurdity of permitting one to testify that he looked and did not see, when, had he properly exercised his sight, he would have seen".

That holding is applicable in the case at bar. Multiplying citations of authority on this question would only needlessly add to the length of this opinion. Human agencies in the operation of signals are no more nearly infallible than mechanical devices mentioned in the Grubb case. The sudden illness or sudden death of a watchman, or an assault upon or wounding him, or an accident to him, might prevent the performance of his duty. Even if he is negligent in that respect, we know of no authority which holds that a traveler is thereby relieved of his duty to use reasonable care for his own safety. Cases cited by appellee where it appeared the traveler was in the exercise of such care and caution are not applicable to this case, where it clearly appears by uncontradicted testimony that decedent's automobile approached and went onto the railroad crossing at a speed of from forty to fifty miles per hour, when, in the day time, at a point 60.6 feet south of the track, he could see the railroad for a distance of 960 feet toward the oncoming train, and at a point 48.5 feet from the track, he could see the tracks for 1600 feet. Manifestly an oncoming electric head light on a locomotive at night is visible and attracts attention farther away than one can see railroad tracks in daylight.

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That holding is applicable in the case at bar. Multiplying citations of authority on this question would only needlessly add to the length of this opinion. Where negligence in the operation of signals are no more nearly infallible than mechanical devices mentioned in the Gumb case. The sudden illness or sudden death of a watchman, or an assault upon or wounding him, or an accident to him, might prevent the performance of his duty. Even if he is negligent in that respect, we know of no authority which holds that a traveler is thereby relieved of his duty to use reasonable care for his own safety. Cases cited by appellee where it appeared the traveler was in the exercise of such care and caution are not applicable to this case, where it clearly appears by uncontradicted testimony that decedent's automobile approached and went onto the railroad crossing at a speed of from forty to fifty miles per hour, when, in the day time, at a point 69.6 feet south of the track, he could see the railroad for a distance of 960 feet toward the oncoming train, and at a point 49.5 feet from the track, he could see the tracks for 1600 feet. Manifestly, an oncoming electric head light on a locomotive at night is visible and attracts attention farther away than one can see railroad track in daylight.

There is no testimony that tends to show that plaintiff's intestate was merely a passenger in the automobile. The car belonged to him, and Whitted was driving. The inference is that they were engaged in a joint enterprise. Being so engaged the negligence of Whitted is imputable to appellant's intestate. (Grubb v. Illinois Terminal Co., supra.) Even if he was merely a passenger, he was not relieved of the duty to exercise due care and caution for his own safety, where, as here, the testimony shows he had ample opportunity to see the approaching train and warn the driver. (Pienta v. Chicago City Railway Co., 284 Ill. 246; Opp v. Pryor, 294 id. 538.)

In our opinion the evidence conclusively shows that appellant's intestate was guilty of contributory negligence which was the proximate cause of his death. Because of this conclusion it is unnecessary to discuss other grounds for reversal urged by appellee. The judgment of the circuit court is reversed.

Judgment reversed.

There is no testimony that tends to show that plaintiff's intestate was merely a passenger in the automobile. He can be-longed to him, and Whitted was driving. The inference is that they were engaged in a joint enterprise. Being so engaged the negligence of Whitted is imputable to appellant's intestate. (Grubb v. Illinois Terminal Co., supra.) Even if he was merely a passenger, he was not relieved of the duty to exercise the care and caution for his own safety, where, as here, the testimony shows he had ample opportunity to see the approaching train and warn the driver. (Pionta v. Chicago City Railway Co., 254 Ill. 240; Opp v. Pryor, 294 id. 328.)

In our opinion the evidence conclusively shows that appellant's intestate was guilty of contributory negligence which was the proximate cause of his death. Because of this conclusion it is unnecessary to discuss other grounds for reversal urged by appellee. The judgment of the circuit court is reversed.

Judgment reversed.

GEN. NO. 9820 Abstract AGENDA NO. 11

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1942

NICOLA PASTORE, Administrator of the Estate of NICHOLAS PASTORE, deceased, Appellant	APPEAL FROM CIRCUIT COURT OF WILL COUNTY.
vs.	
CHARLES SASSO, Appellee	

DOVE, J.:

Nicholas Pastore, a child approximately eight years and eight months of age, was struck by an automobile driven in a southerly direction by appellee along a public highway in Wi l County, and died as a result thereof. The highway is in a suburb of the City of Joliet, and is known as North Broadway and also as U. S. Route 66a. The accident occurred at a street intersection where Rose Avenue joins the west side of the highway. Appellant, as administrator of the decedent's estate, brought a suit in the circuit court of Will County against appellee for damages on account of the death of his intestate by the alleged negligence of appellee. At the close of the testimony for appellant the trial court directed a verdict for appellee, and the cause is here on appeal from a judgment on the verdict.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1940

NICOLA PASTONE, Administrator of the Estate of NICHOLAS PASTONE, deceased, Appellant, vs. CHARLES SASSO, Appellee	APPEAL FROM CIRCUIT COURT OF KANE COUNTY.

DOVE, J.:

Nicholas Pastone, a child approximately eight years and eight months of age, was struck by an automobile driven in a southerly direction by appellee along a public highway in Kane County, and died as a result thereof. The highway is in a suburb of the City of Joliet, and is known as North Broadway and also as U. S. Route 66A. The accident occurred at a street intersection where Maple Avenue joins the west side of the highway. Appellant, as administrator of the decedent's estate, brought a suit in the circuit court of Kane County against appellee for damages on account of the death of the intestate by the alleged negligence of appellee. At the close of the testimony for appellant the trial court directed a verdict for appellee, and the cause is here on appeal from a judgment on the verdict.

Appellee's motion in this court to dismiss the appeal, on account of several material insufficiencies and omissions in the abstract, and for a failure to make any reference in the brief and argument to either the abstract or the record, was taken with the case. All the complained of defects in the abstract are supplied by the additional abstract filed by appellee, without which the appeal must have been dismissed or the judgment affirmed pro forma. The additional abstract was therefore necessary. The brief and argument of appellee makes appropriate references to the pages of the abstract and of the additional abstract where the material testimony is found, relieving this court of the necessity of exploring the abstract or the record. The motion to dismiss the appeal is therefore denied.

The complaint alleges that the plaintiff's intestate was lawfully crossing the highway in an easterly direction; that the habit and custom of persons, and particularly children, in crossing the highway at that point, on the day stated, was well known, or by the exercise of due care should have been known, to the defendant; that the intestate, at and before the time of the occurrence, was in the exercise of due care and caution for his own safety; that the defendant did one or more of the following negligent acts, and as a direct and proximate result thereof his automobile came into violent collision with the intestate, by means whereof he sustained physical injuries which caused his death on the same day: (a) drove the automobile at a speed greater than was reasonable and proper having regard to the traffic and the use of the way and so as to endanger the life or limb or injure the property of any person, in violation of the statutes, (Ill. Rev. Stat. 1941, chap. 95½, par. 146.); (b) negligently drove at a dangerous rate of speed approaching and crossing where Rose Avenue joins the highway; (c) negligently drove with defective brakes and was unable to slacken speed due to their condition; (d) negligently failed to have the automobile

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The complaint alleges that the plaintiff's intestate was lawfully crossing the highway in an easterly direction; that the brake and control of a passenger-and-pertenant-ambulance, in crossing the highway at that point, on the day stated, was well known, or by the exercise of due care should have been known, to the defendant; that the intestate, at and before the time of the occurrence, was in the exercise of due care and caution for his own safety; that the defendant did, on or near the following negligent acts, and as a direct and proximate result thereof the automobile came into violent collision with the intestate, by means whereof he sustained physical injuries which caused his death on the same day: (a) drove the automobile at a speed greater than was reasonable and proper having regard to the traffic and the use of the way and so as to endanger the life or limb or injure the property of any person, in violation of the statutes, (III. Rev. Stat. 1913, chap. 95½, par. 146.); (b) negligently drove at a dangerous rate of speed approaching and crossing where Rose Avenue joins the highway; (c) negligently drove with defective brakes and was unable to slacken speed due to their condition; (d) negligently failed to have the automobile

under control and was unable to slacken or stop the same; (e) negligently failed to keep a proper lookout for persons who might be crossing the highway at that time and place; (f) failed and neglected to sound a horn or give other warning to the intestate of the approach of the automobile; (g) otherwise so negligently managed and operated the automobile that it ran into the intestate. The answer denies each of these allegations.

The grounds assigned for reversal are that the court erred in directing a verdict of not guilty; that the verdict is against the weight of the evidence, and is against the law; that the judgment is against the law, and that the court erred in denying appellant's motion for a new trial, his motion in arrest of judgment, and in entering judgment against him.

Cross errors assigned by appellee are that the court erred in holding that Nicky Delrose, an eye witness, was incompetent; in admitting testimony as to careful and cautious habits of the intestate; and that appellant committed prejudicial error in continuing to ask leading and suggestive questions after repeated objections by appellee and after being requested by the trial judge to desist therefrom.

Where there is a motion to direct a verdict for the defendant, the evidence is considered in its aspect most favorable to the plaintiff, with all the inferences reasonably deducible, to determine whether there is a total failure to prove an element essential to maintenance of the cause of action alleged. (Beckett v. F. W. Woolworth Co. 376 Ill. 470, 475.) The court does not on such motion, weigh the evidence, or consider its preponderance. The question is whether there is any evidence which fairly tends to prove the allegations of the complaint. (Peters v. Peters, 376 Ill. 237, 241; McFarlane v. Chicago City Railway Co. 288 id. 476, 478.)

under control and was unable to slacken or stop the same; (e) negligently failed to keep a proper lookout for persons who might be crossing the highway at that time and place; (f) failed and neglected to sound a horn or give other warning to the interest to of the approach of the automobile; (g) otherwise so negligently managed and operated the automobile that it ran into the intestate. The answer denies each of these allegations.

The grounds assigned for reversal are that the court erred in directing a verdict of not guilty; that the verdict is against the weight of the evidence, and is against the law; that the judgment is against the law, and that the court erred in denying appellant's motion for a new trial, his motion in arrest of judgment, and in entering judgment against him.

Gross errors assigned by appellee are that the court erred in holding that Nicky Salcose, an eye witness, was incompetent; in admitting testimony as to careful and cautious habits of the intestate; and that appellant committed prejudicial error in continuing to ask leading and suggestive questions after repeated objections by appellee and after being requested by the trial judge to desist therefrom.

Where there is a motion to direct a verdict for the defendant, the evidence is considered in its most favorable to the plaintiff, with all inferences reasonably deducible, to determine whether there is a total failure to prove an element essential to maintenance of the cause of action alleged. (Beckett v. F. W. Woolworth Co. 372 Ill. 470, 476.) The court does not on such motion, weigh the evidence, or consider its preponderance. The question is whether there is any evidence which fairly tends to prove the allegations of the complaint. (Peters v. Peters, 372 Ill. 327, 341; McFarlane v. Chicago City Railway Co. 288 id. 478, 479.)

The evidence discloses that the accident occurred about nine o'clock in the morning on July 22, 1941. The sun was shining and the road was dry. Rose Avenue runs east and west, joining the west side of North Broadway, which runs north and south at that point, and curves to the east a short distance north of the intersection. There is no intersecting street on the east side of North Broadway at Rose Avenue, and the ground declines to the east where there is a path leading to some private vegetable gardens. City busses stop on each side of North Broadway at the Rose Avenue intersection. Photographs in evidence show a concrete sidewalk on the west side of North Broadway extending north from Rose Avenue, but no sidewalk on the north side of Rose Avenue or the east side of North Broadway, and no marked cross-walk across North Broadway. Between Theodore Street, four blocks south of Rose Avenue and the E. J. & E. railroad tracks, north of Rose Avenue, a distance of about one half mile, there are about twenty homes, a store and a saloon.

Shortly before the accident Jennie Ciancanelli, her daughter Concetta, Mary Capitano, Catherine Capitano and Bettie Kambic were standing on the northwest corner of the intersection waiting for a bus. They stood in a huddle in an irregular curved line, four of them facing west. The decedent was seen, prior to the accident, coming down Rose Avenue. Mary Capitano testified he was standing between her and North Broadway, but she did not know just where. It does not appear that any of the other members of the group saw him at that time, or that any of them, including Mary Capitano saw him enter North Broadway. Various members of the group testified they heard the noise of the stopling of a machine, or the brakes of a car, or the squealing of brakes, or a noise something like a bump. One of them testified she did not hear any horn sounded. When they turned around they saw the boy lying

The evidence discloses that the accident occurred about nine o'clock in the morning on July 29, 1941. The sun was shining and the road was dry. Rose Avenue runs east and west, joining the west side of North Broadway, which runs north and south at that point, and curves to the east a short distance north of the intersection. There is no intersecting street on the east side of North Broadway at Rose Avenue, and the ground declines to the east where there is a path leading to some private vegetable gardens. City bus-stops stop on each side of North Broadway at the Rose Avenue intersection. Photographs in evidence show a concrete sidewalk on the west side of North Broadway extending north from Rose Avenue, but no sidewalk on the north side of Rose Avenue or the east side of North Broadway, and no marked cross-walk across North Broadway. Between Theodore Street, four blocks south of Rose Avenue and the E. J. & I. railroad tracks, north of Rose Avenue, a distance of about one half mile, there are about twenty houses, a store and a saloon.

Shortly before the accident Jennie Giannanelli, her daughter Concette, Mary Capitano, Catherine Capitano and Betty Kubik were standing on the northwest corner of the intersection waiting for a bus. They stood in a huddle in an irregular curved line, four of them facing west. The deceased was seen, prior to the accident, coming down Rose Avenue. Mary Capitano testified he was standing between her and North Broadway, but she did not know just where. It does not appear that any of the other members of the group saw him at that time, or that any of them, including Mary Capitano saw him enter North Broadway. Various members of the group testified they heard the noise of the stopping of a machine, or the brakes of a car, or the squealing of brakes, or a noise something like a bump. One of them testified she did not hear any horn sounded. When they turned around they saw the boy lying

on or just north of a black patch on the pavement. Appellee parked his car at the curb near some mail boxes on the west side of North Broadway about one hundred twenty feet south of the north side of Rose Avenue, and got out of the car. Jennie Ciancanelli picked the boy up, took him to the sidewalk, and appellee then took him to the hospital in his car. Appellant claims in his argument that the black patch on the pavement was in the first lane west of the center line, but his exhibit 3, a photograph, shows there are four travel lanes, with a parking lane on each side of the pavement next to the curb, and the black patch is in the west travel lane, next to the west parking lane, and is not in the travel lane next to the center line of the pavement. The position of the black patch in the west travel lane is further borne out by the testimony of Jennie Ciancannelli, who testified that from where she stood on the sidewalk, she took four or five steps to pick up the boy.

Mary Capitano testified on direct examination that they were not paying much attention to appellee's car, and that she just got a glimpse of it; that it was going in a southerly direction, stopping at the mail box, in a "curvy" direction around the boy to the mail box. On cross-examination she testified that appellee steered the car around the boy against the curb to park it, and that if he had stopped when she first saw the car he would have been in the middle of the roadway. After the noon hour she testified on re-direct examination that she did not see the car go around the boy, first testifying she did not discuss her testimony with either of appellant's counsel during the noon hour. She then admitted that she had told one of the attorneys for appellant during the noon recess that she did not understand one of the questions of appellee's counsel and had answered it wrong.

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During the examination of the witness Marie Delrose, whose home is on the east side of North Broadway, directly across from the northwest corner of the intersection, she testified that her son Nicky, eight years old, saw the accident. When appellant's counsel interrogated her as to the careful and cautious habits of the decedent, appellee's counsel interposed an objection on the ground that there was an eye witness. Thereupon Nicky was called by appellee, who had previously subpoenaed him, and he was examined on voir dire out of the presence of the jury to test his competency. His nickname is "Geno". He had not been subpoenaed by appellant. He testified to his age; that he was in the third grade at school, knew how to read and write; that they were taught arithmetic, spelling, no geography or history, and that he was taught at school and by his folks about telling the truth. The following questions and answers appear in his testimony: Q. "Do you know the difference between telling the truth and not telling the truth?" A. "No." Q. "What do you do when you don't tell the truth? What do you tell, if you do not tell the truth?" Q. By the court: "What happens to you if you tell a lie?" A. "You get prison." Q. By the court: "Do you know what happens if you swear to tell the truth? If you are asked to, you have got to tell the truth; what happens if you don't?" No answer. Q. "If you are asked to tell the truth and then don't tell the truth, is that wrong or right?" A. "I don't know." Q. By the court: "Is it wrong not to tell the truth? What do you understand? If you don't understand, just say so. Nicky, do you know what---" A. "I don't understand." Q. "Is it wrong to tell a lie? Do you know what a lie is?" A. "Yes" Q. "Is it wrong to tell a lie?" At this point the court interrupted the examination with the statement: "You have pursued enough," and asked the witness if he had catechism, to which he replied that he had not had it; that he did not go to church,

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but would go. The witness then testified that he knew Nickey Pastore, and did know what happened to him, "but I have forget all about it. I forget some of it." He then testified he saw the decedent in an automobile accident; that he was not scared"with all these people standing around"; that he understood what counsel was saying when he asked him if he knew what happendd to Nicky last summer; that Nicky was in an accident with a car; that the right fender of the car hit him; that he saw the car and saw it hit him, and was on the porch of his house at the time; that he was telling the truth, and if it weren't the truth, he would be telling a lie; and that it would not be right to tell a lie. Q. "What is right, to tell the truth or else tell a lie?" A. "Tell the truth is right". He then testified the car threw or dragged the decedent. Q. "Did you see Nicky before the car hit him?" A. "I don't think - I forget." Pursuant to further questioning, he testified: "I did see him go across the street. He was running. I could see him from my house. He was running this way from the other side of the street toward my house that was near the corner of Rose Street." Q. "Are you a little bit frightened, Geno, with ---" A. "Yes." "All these people standing around? " A. "No". The court then stated he did not think the witness was competent. Appellee tendered him as a witness, and appellant's objection to his competency was sustained. Thereafter, over appellee's objection, several witnesses testified to the decedent's habits of care and caution in crossing streets.

It appears that the witness was confused by the nature of the questions first asked him, which might confuse any child, and probably some adults. (People v. Peck, 314 Ill. 237, 241.) When later questions were asked him in a way which he understood, it is clear that he knew and understood the difference between telling the truth and telling a lie, and that it is right to tell the truth and wrong to tell a lie. So, too, as to his memory of the accident, his testimony

but would go. The witness then testified that he knew Bailey Factors, and did know what happened to him, "but I hard forget all about it. I forget some of it." He then testified he saw the defendant in an automobile accident; that he was not accused "with all these people standing around"; that he understood what counsel was saying when he asked him if he knew what happened to Nicky last summer; that Nicky was in an accident with a car; that the right fender of the car hit him; that he saw the car and saw it hit him, and was on the porch of his house at the time; that he was telling the truth, and if it weren't the truth, he would be telling a lie; and that it would not be right to tell a lie. Q. "Just is right, to tell the truth or else tell a lie?" A. "Tell the truth is right". He then testified the car threw or dragged the deceased. Q. "Did you see Nicky before the car hit him?" A. "I don't think - I forget." Pursuant to further questioning, he testified: "I did see him go across the street. He was running. I could see him from my house. He was running this way from the other side of the street toward my house that was near the corner of Rose Street." Q. "Are you a little bit frightened, Benny, with ---" A. "Yes?" "All these people standing around?" A. "No". The court then stated he did not think the witness was competent. Appellee tendered him as a witness, and appellant's objection to his competency was sustained. Thereafter, over appellee's objection, several witnesses testified to the deceased's habits of care and caution in crossing streets.

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shows that he was somewhat frightened and confused at being in court, and first felt he had forgotten part of the details of the accident, but, as he was questioned further, he recalled the events that he saw. The same thing might happen to anybody. His intelligence is apparent from his testimony.

The test of the competency of a witness is not one of age, or religious belief, but of intelligence and understanding, and the moral obligation to speak the truth. (People v. Schladweiler, 315 Ill. 553, 555; Shannon v. Swanson, 208 id. 52, 54; Sokel v. People, 212 id. 238, 241.) In our opinion the testimony of the witness meets these tests. While a court of review will not ordinarily disturb the finding of the trial court on the competency of such witness, unless there has been an abuse of the discretion with which the trial judge is to some extent vested, or a manifest misunderstanding of some legal principle, (Shannon v. Swanson, supra), we think that in this case it is clear that the witness was competent. It was therefore error to exclude his testimony.

There being a competent eye witness to the accident, it was also error to admit testimony as to habits of care and caution on the part of the decedent. (City of Salem v. Webster, 192 Ill. 369, 372; Chicago and Alton R. R. Co. v. Pearson, 184 id. 386, 392; [illegible]; Nordman v. Carlson, 291 Ill. App. 438; Micca v. Alton Ry. Co., 281 id. 216.)

The following testimony of Concetta Ciancanelli indicates that she, too, may have seen the accident: Q. "You saw the car that hit the boy?" A. "Yes." Q. "Was it traveling or coming to a stop?" A. "Coming to a stop and hit him. After a little he hit the boy."

Decedent's brother, Theodore Pastore, testified that he saw appellee's car at the hospital after the accident and saw blood stains "near the radiator there; left side, driver's side, fender." Appellant argues that this demonstrates that the decedent was going east across the highway and had almost passed the pathway of appellee's car, and that

shows that he was accompanied frightened and confused at being in court, and first felt he had forgotten part of the details of the accident, but, as he was questioned further, he remembered the events that he saw. The same thing might happen to anybody. His credibility is unaffected from his testimony.

The test of the competency of a witness is not one of age, nor religious belief, but of intelligence and understanding, and an moral obligation to speak the truth. (People v. Schmadebeck, 216 Ill. 588, 589; Shannon v. Swanson, 208 Ill. 52, 54; Nabel v. People, 218 Ill. 434, 441.) In our opinion the testimony of the witness meets these tests. While a court of review will not ordinarily disturb the finding of the trial court on the competency of such witness, unless there has been an abuse of the discretion with which the trial judge is to some extent vested, or a manifest misunderstanding of some legal principle, (Shannon v. Swanson, supra), we think that in this case it is clear that the witness was competent. It was therefore error to exclude his testimony.

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The following testimony of Commette Giancarelli indicates that she, too, may have seen the accident: Q. "Did you see the car that hit the boy?" A. "Yes." Q. "Was it travelling or coming to a stop?" A. "Coming to a stop and hit him. After a little he hit the boy."

Decedent's brother, Theodore Pantore, testified that he was upstairs over at the hospital after the accident and saw blood stains "near the radiator there; left side, driver's side, fender." Appellant argues that this demonstrates that the decedent was going east across the highway and had almost passed the pathway of appellee's car, and that

appellee could or should have seen him as he was crossing in front of the car and in its pathway. This testimony does not have the probative force claimed by appellant. To give it such force, we would have to first presume that the boy was going east across the highway, of which there is no evidence. Upon that presumption we should next have to presume that he had almost passed across the path of appellee's car, and that appellee could or should have seen him, thus basing presumption upon presumption. A presumption cannot be based upon a presumption or an independent inference upon another inference. (Globe Accident Insurance Co. v. Gerisch, 163 Ill. 625, 629; Ohio Building Vault Co. v. Industrial Board 277 id. 96, 110.) As was said in United States v. Ross, 92 U. S. 281: "No inference of fact or law is reliably drawn from premises which are uncertain." Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. (Globe Accident Insurance Co. v. Gerisch, supra.) Further circumstances in this connection are to be noticed. There is no testimony that the car was traveling fast. The testimony of Concetta Giancanelli and Mary Capitano tends to show the opposite. Under those circumstances, even if it be assumed, as claimed by appellant, that the boy was moving east across the highway, it is just as logical to presume that he could have been struck by the front end of the right fender of the car, and because of his motion in going east, would pitch forward and contact the left fender, as it is to presume that he was first struck by the left fender.

The evidence shows that the black patch on the pavement is only about six feet south of where a cross walk, if any had been indicated on the pavement, would cross North Broadway. If the decedent was crossing the highway at that place, as claimed by appellant, he was not thrown or dragged more than six or eight feet when struck, which strengthens the inference from the testimony of the two witnesses last named,

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The evidence shows that the black patch on the pavement is only about six feet south of where a cross walk, if any had been indicated on the pavement, would cross North Broadway. If the deceased was crossing the highway at that place, as claimed by appellant, he was not thrown or dragged more than six or eight feet when struck, which strengthens the inference from the testimony of the two witnesses last named,

that appellee was not driving at an unreasonable or unsafe speed. There is no testimony that there were any skid marks on the pavement, or that the sound of the brakes continued after the boy was struck. The fact that no horn was sounded is just as consistent with the boy having run out in front of the car as it is with appellant's theory that appellee was not keeping a proper look out. There is no testimony that persons frequently crossed the highway at that point, or that appellee's car had defective brakes, or as to the speed of the car, or that it was out of his control. The fact that a witness, who was digging stone about forty feet east of the highway, heard the sound of the brakes, does not tend to show excessive speed. It is common knowledge that brakes which squeal will ordinarily be heard that far or farther; and there is no showing that squealing brakes are defective in point of stopping a car.

The testimony as to the decedent's habits of care and caution being incompetent, is obviously not to be considered in determining whether the court erred in directing a verdict for appellee. Summarizing all the competent testimony in its aspect most favorable to appellant, there is no testimony which fairly tends to show that appellee was guilty of any of the negligence charged in the complaint, or that the decedent was in the exercise of due care and caution for his own safety. On the other hand, if the testimony of Nicky Delrose had been admitted, as it should have been, it would have shown that the decedent was not in the exercise of such due care and caution.

Negligence is never presumed. It was necessary, in order to recover, for appellant to prove both that his intestate was in the exercise of due care and caution for his own safety, and that his death was caused by the negligence of appellee. (Casey v. Chicago Railways Co., 269 Ill. 386,390.) The doctrine of res ipsa loquitur, invoked

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by appellant, is, that whenever a thing which produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford prima facie evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. (Bollenbach v. Bloomenthal, 341 Ill. 539, 542.) Such an explanation would obviously have been made in this case through the testimony of Nicky Delrose, if he had been permitted to testify. Such testimony would have been a complete answer to the doctrine, and appellee is not to be penalized by applying the doctrine through the error in excluding the witness. To do so would violate every canon of law and deprive appellee of a fair trial. Cases cited by appellee, where such a factor was not present, have no application here, and neither has the doctrine.

What is above said answers the contention as to appellee's duty to yield the right of way to pedestrians at cross walks. (Ill. Rev. Stat. 1941, chap. 95½, par. 171 (a).

Our conclusion that appellant has failed to make out a case is supported by Casey v. Chicago Railways Co., supra; Roberts v. City of Rockford, 296 Ill. App. 469; Zink v. Breese Grain Co., 260 id. 281.

There was no error in directing a verdict for appellee in this case, and the judgment of the trial court is affirmed.

Judgment affirmed.

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That is above said answers the contention of the appellee's duty to yield the right of way to pedestrians at cross walks. (Ill. Rev. Stat. 1941, chap. 95½, par. 171 (a).

Our conclusion that appellant has failed to make out a case is supported by Dorsey v. Chicago Railways Co., supra; Roberts v. City of Rockford, 296 Ill. App. 489; Zink v. Reese Grain Co., 260 id. 291.

There was no error in directing a verdict for appellee in this case, and the judgment of the trial court is affirmed.

Judgment affirmed.

GEN. NO. 9844 Abstract AGENDA NO. 29

317 I.A. 539

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1942

PEOPLE OF THE STATE OF ILLINOIS, ex rel., LESTER F. CARSON, State's Attorney, Appellee vs. NONA CROWE, Appellant	APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY.

DOVE, J.:

Upon the complaint of appellee the circuit court of Peoria County on April 2, 1942 issued a temporary injunction restraining appellant from maintaining, using, or permitting to be used the premises described as 215 Walnut Street, in the City of Peoria, for the purposes of lewdness, assignation or prostitution. This writ was duly served on appellant by the sheriff of Peoria county on April 4, 1942. On June 29, 1942 upon the petition of the state's attorney a rule was entered by the circuit court against appellant Nona Crowe and one Helen Carter to show cause why they should not be punished for contempt of court for neglecting and refusing to comply with the order of April 2, 1942. No service was had upon Helen Carter but appellant was served and in her answer she admitted the entry of the order on April 2, 1942, the issuance and service

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DOVE, J.:

Upon the complaint of appellee the circuit court of Peoria county on April 2, 1942 issued a temporary injunction restraining appellant from maintaining, using, or permitting to be used the premises described as 218 Walnut Street, in the City of Peoria, for the purposes of lewdness, assignation or prostitution. This writ was duly served on appellant by the sheriff of Peoria county on April 4, 1942. On June 29, 1942 upon the petition of the state's attorney a rule was entered by the circuit court against appellant Nona Okowe and one Helen Carter to show cause why they should not be punished for contempt of court for neglecting and refusing to comply with the order of April 2, 1942. No service was had upon Helen Carter but appellant was served and in her answer she admitted the entry of the order on April 2, 1942, the issuance and service

of the preliminary injunction, denied that she wilfully and persistently refused to comply with its provisions and denied that since the entry of that order and the issuance of the temporary writ she has maintained, used or permitted to be used the premises described in the writ for the purposes of lewdness, assignation, or prostitution. A hearing was had in open court resulting in a finding that appellant has wilfully permitted said premises to be used for the purposes aforesaid and finding her guilty of contempt and sentencing her to the county jail of Peoria county for sixty days. To reverse that order the record is brought to this court for review.

Ray Streibich, Robert Bayles and Sam Belfer testified on behalf of appellee that they were all members of the Peoria Junior Chamber of Commerce and members of a committee of that association which was investigating prostitution in Peoria. That on the evening of June 15, 1942 between ten thirty and eleven o'clock they were investigating houses of prostitution in the neighborhood of 215 Walnut street and were attracted to the brick residence there located and occupied by appellant, by some girls rapping on the window as they passed along the street. They went up the steps leading to the front door. They did not ring the bell but a colored maid opened the door and admitted them into the reception room. A white girl called "Helen" was called by the maid. Helen is described as a brunette, about twenty seven years of age, weighing about one hundred forty pounds and dressed in a beautiful velvet gown. When Helen came in she asked them to put a dime in the music box. Appellant entered the room to get her coat which was hanging in a closet and was referred to by Helen as "Mom Crowe","the madam", and as "the lady who run the house". There was some conversation between Helen and appellant and after the music box was started Helen in the presence of appellant wanted to know if the witnesses didn't want to go up stairs and invited them to do so. She described herself as "good and tight" and quoted

of preliminary injunction, denied that she illegally and arbitrarily refused to comply with the provisions and denied that there was entry of that order and the issuance of the temporary writ she maintained, used or permitted to be used the premises described in the writ for the purposes of lewdness, assignation, or prostitution. A hearing was had in open court resulting in a finding that appellant has illegally permitted said premises to be used for the purposes aforesaid and finding her guilty of contempt and sentencing her to the county jail of Marion county for sixty days. To reverse that order the record is brought to this court for review.

Ray Hendricks, Robert Gayles and Sam Belfer testified on behalf of appellee that they were all members of the Marion Chamber of Commerce and members of a committee of that association which was investigating prostitution in Marion. That on the evening of June 16, 1942 between ten thirty and eleven o'clock they were investigating houses of prostitution in the neighborhood of 215 Walnut street and were attracted to the white residence there located and occupied by appellant, by some girls rapping on the window as they passed along the street. They went up the steps leading to the front door. They did not ring the bell but a colored maid opened the door and admitted them into the reception room. A white girl called "Helen" was called by the maid. Helen is described as a brunette, about twenty seven years of age, weighing about one hundred forty pounds and dressed in a beautiful velvet gown. When Helen came in she asked them to put a dime into music box. Appellant entered the room to get her coat which was hanging in a closet and was referred to by Helen as "the Drone", "the madam", and as "the lady who run the house". There was some conversation between Helen and appellant and after the music box was started Helen in the presence of appellant asked to know if the witness Hendricks wanted to go up stairs and invited them to do so. She described herself as "good and tight" and quoted

prices for sexual intercourse ranging from $2.00 for twenty minutes to $5.00 for an hour. When the witnesses left they told her they would probably be back again and she replied that they would be open until three or four o'clock in the morning and intited them to return. One of the witnesses stated that he told Helen that they had been all over town trying to find a couple of joints and wondered what was going on as they were unable to find any other place open. Helen stated that there was a drive going on and that all the places were closed. Reference was made by Helen to the fact that there were other girls upstairs and all they had to sell was women and music and a derogatory reference was made to the assistant state's attorney regarding the drive that he was putting on to close houses of this character and that they had to operate not as openly as they did before.

Appellant testified that her home was at 215 Walnut Street in Peoria and had been for one year; that prior to February 1, 1942 she had operated a house of prostitution there but since that date it had not been used for anything other than her private home; that Helen Carter was the girl the witnesses for the People were talking to in her home on the evening of June 15th; that she had no maid there at that time but another girl, June, who fell while roller skating was there but she was ill and in bed and had been for a long time. That she told the witnesses for appellee that there was nothing doing and that the place was closed; that Helen had come in not more than twenty minutes before the men came that evening and had gone upstairs to see June when the door bell rang and as appellant was unable to answer the bell Helen did so; that appellant afterwards came down stairs, remained not more than five minutes and then left going to a drug store and when she returned the men were gone; that the music box was not in operation that night and had not been since February.

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Appellant testified that her home was at 218 Walnut Street in Peoria and had been for one year; that prior to February 1, 1942 she had operated a house of prostitution there but since that date it had not been used for anything other than her private home; that Helen Barber was the girl the witnesses for the People were talking to in her home on the evening of June 18th; that she had no maid there at that time but another girl, June, who fell while roller skating was there but she was ill and in bed and had been for a long time. That the witnesses for appellee that there was nothing doing and that the place was closed; that Helen had come in not more than twenty minutes before the men came that evening and had gone upstairs to see June when the door bell rang and as appellant was unable to answer the bell Helen did so; that appellant afterwards came down stairs, remained not more than five minutes and then left going to a drug store and when she returned the men were gone; that the music box was not in operation that night and had not been since February.

Harold Haney testified that he was a serviceman for the Peoria Phonograph people, was familiar with the premises where appellant lives and that in the first part of February the Wurlitzer coin machine there located was broken and not capable of being operated and that he did not fix it and had never been back to repair it since.

Counsel for appellant argue that the one isolated visit to the home of appellant by the witnesses for the People on the evening of June 15, 1942 is not sufficient to support the finding of the trial court that she was operating a house of prostitution, that much of the conversation which the several witnesses detailed was outside of the presence of appellant and therefore she, appellant, should not be bound thereby. The evidence is that the witnesses were there about thirty minutes and that they remained together. According to Mr. Streibich appellant was present about twenty minutes or two thirds of the time they were there. Mr. Bayles testified that they had been there fifteen or twenty minutes when appellant came in and Mr. Belfer thought she left about five minutes before they did. In answer to the question of the State's attorney whether appellant was present and heard Helen invite Mr. Streibich to go upstairs, his answer was that she did. Mr. Bayles testified that Helen said to him in appellant's presence that all they had there was women and music and wanted him to go upstairs with her and see her tight, Scotch-Irish pussy. Mr. Belfer testified that Helen told him that another girl by the name of June was upstairs and appellant said to him: "One of my girls is upstairs, she had an ulcer on the tubes" and all the witnesses state that in the presence of appellant, Helen informed them of the scale of prices.

Harold Hane, testified that he was a servicemen for the Peerless Phonograph Company, was familiar with the premises where appellant lives and that in the first part of February the Wurlitzer coin machine there located was broken and not capable of being operated and that he did not fix it and had never been back to repair it since.

Counsel for appellant argue that the one isolated visit to the home of appellant by the witnesses for the people on the evening of June 15, 1942 is not sufficient to support the finding of the trial court that she was operating a house of prostitution, that much of the conversation which the several witnesses detailed was outside of the presence of appellant and therefore she, appellant, should not be bound thereby. The evidence is that the witnesses were there about thirty minutes and that they remained together. According to Mr. Strelbich appellant was present about twenty minutes or two thirds of the time they were there. Mr. Bayles testified that they had been there fifteen or twenty minutes when appellant came in and Mr. Seifer thought she left about five minutes before they did. In answer to the question of the state's attorney whether appellant was present and heard Helen invite Mr. Strelbich to go upstairs, his answer was that she did. Mr. Bayles testified that Helen said to him in appellant's presence that all they had there was women and music and wanted him to go upstairs with her and see her tight, Scotch-Irish pussy. Mr. Seifer testified that Helen told him that another girl by the name of June was upstairs and appellant said to him: "One of my girls is upstairs, she had an ulcer on the tubes" and all the witnesses state that in the presence of appellant, Helen informed them of the scale of prices.

The rapping on the window which attracted the attention of the witnesses, the appearance of the colored maid, the opening of the door by her before any bell was rung, the presence of the music box, the appearance of Helen Carter, a prostitute who, prior to February 1, had been so employed by appellant, the presence of June upstairs, of whom appellant spoke as "one of her girls", the reference to appellant and the terms applied to her; all these facts and others which the evidence tended to prove when considered in the light of all the circumstances shown in this record, abundantly sustain the findings of the chancellor. According to the usual laws of reason and common experience the only conclusion that can be drawn from the evidence in this record is that the provisions of the temporary injunction were being wilfully violated by appellant.

Appellant's testimony that she told the witnesses for the People that her place was closed and that there was nothing doing is expressly denied by Mr. Bayles and Mr. Streibich who testified that he was smart enough to see that it was open.

The trial court believed the testimony of appellee's witnesses. We have read all the evidence as abstracted. It amply sustains the finding and judgment of the circuit court and that judgment will be affirmed.

Judgment affirmed.

The rapping on the window which attracted the attention of the witnesses, the appearance of the colored maid, the opening of the door by her before any knocking, the presence of the music box, the appearance of Helen Carter, a prostitute who, prior to February 1, had been employed by appellant, the presence of three negroes, of whom appellant spoke as "one of her girls", the reference to appellant and the three negroes, applied to her; all these facts are others which the evidence tended to prove when considered in the light of all the circumstances shown in this record, should fully sustain the findings of the chancellor. According to the weight law of reason and common experience the only conclusion that can be drawn from the evidence in this record is that the provisions of the temperance injunction were being willfully violated by appellant.

Appellant's testimony that she told the witnesses for the People that her place was closed and that there was nothing going on was flatly denied by Mr. Duplessard Mr. Strelsich who testified that he was around enough to see that it was open.

The trial court believed the testimony of appellee's witnesses. We have read all the evidence as contended. It fully sustains the finding and judgment of the circuit court and that judgment will be affirmed.

Judgment affirmed.

Gen. No. 9818. Agenda No. 25.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1942.

UNION CABINET COMPANY, a Corporation, (Plaintiff) Appellee, vs. INTERSTATE HOTELS COMPANY, a Corporation, (Defendant) Appellant.	Appeal from Circuit Court, Lake County.

WOLFE,-- J.

The Union Cabinet Company, a corporation, entered into a contract with the Interstate Hotels Company, a corporation, to furnish certain equipment, and material for improvements to one of its hotels. The plaintiff filed a complaint in the Circuit Court of Lake County, alleging there was a balance due on the contract of $719.63. In this, was an item for 'extras,' for $350.50. The defendant filed its answer and admitted the making of the original contract, but denied that there were any 'extras,' ordered by the defendant, and denied that it was indebted to the plaintiff in the sum of $719.63. The defendant's

Mem. 20. 1922. Agenda No. 10.

IN THE

SUPERIOR COURT OF LITCHFIELD

BEFORE: JUSTICE

CHARLES ETC. A.D. 1922.

UNION CABINET COMPANY, a Corporation,
(Plaintiff) Appellee,

vs.

INTERSTATE HOTELS COMPANY, a Corporation,
(Defendant) Appellant.

Mem. and Trans.
Superior Court,
Tax Comm'r.

NOTE:-- 1.

The Union Cabinet Company, a corporation, entered into a contract with the Interstate Hotels Company, a corporation, to furnish certain equipment, and material for improvements to one of its hotels. The plaintiff filed a complaint in the Superior Court of Lake County, alleging there was a balance due on the contract of $710.00. In this, was an item for 'extras,' for $300.00. The defendant filed its answer and admitted the making of the original contract, but denied that there were any 'extras,' ordered by the defendant, and denied that it was indebted to the plaintiff in the sum of $710.00. The defendant's

answer contained an itemized statement in which damages were claimed because of the failure to furnish certain articles in the contract. They also filed a counterclaim alleging that the plaintiff was indebted to the defendant in the sum of $22.51. The case was tried before the Court by a jury, and a verdict was rendered in plaintiff's favor in the sum of $544.38. Judgment was rendered on this verdict, and an appeal has been perfected to this Court.

It is insisted by the appellant that the verdict of the jury is against the manifest weight of the evidence, and is a compromise verdict. The plaintiff gave its version of the contract and the 'extras' furnished, and the defendant gave its version. It was a province of the jury to weigh the testimony and decide the questions of fact presented to them. Evidently the jury found that pay for some of the 'extras,' as claimed by the plaintiff, should not be allowed, and deducting these amounts from the original claim of the plaintiff, the verdict rendered by the jury of $544.38 was proper.

It is claimed by the appellant that the Court committed reversible error by not giving their refused instruction, which states the law relative to the burden of proof applicable to the facts in this case. There were only two instructions given by the Court, and each of them was relative to the burden of proof, and properly set forth the law relative to the same. There is no error in the Court's refusing to give the defendant's instruction. We find no reversible error in the case. The judgment of the trial court is hereby affirmed.

Affirmed.

answer contained an itemized statement in which damages were claimed because of the failure to furnish certain articles in the contract. They also filed a counterclaim alleging that the plaintiff was indebted to the defendant in the sum of $2,31. The case was tried before the court by a jury, and a verdict was rendered in plaintiff's favor in the sum of $243.30. Judgment was rendered on this verdict, and an appeal has been perfected to this Court.

It is insisted by the appellant that the verdict of the jury is against the manifest weight of the evidence, and is a compromise verdict. The plaintiff gave its version of the contract and the parties' furnished, and the defendant gave its version. It was a province of the jury to weigh the testimony and decide the questions of fact presented to them. Evidently the jury found that by reason of the 'extras,' as claimed by the plaintiff, should not be allowed, and deducting these amounts from the original claim of the plaintiff, the verdict rendered by the jury of $243.30 was proper.

It is claimed by the appellant that the Court committed reversible error by not giving their refused instruction, which states the law relative to the burden of proof applicable to the facts in this case. There were only two instructions given by the Court, and none of them was relative to the burden of proof, and properly set forth the law relative to the case. There is no error in the Court's refusing to give the defendant's instruction. We find no reversible error in the case. The judgment of the trial court is hereby affirmed.

Affirmed.

Gen. No. 9848 Agenda No. 31.

IN THE

APPELLATE COURT OF ILLINOIS

FOR THE SECOND DISTRICT.

OCTOBER TERM, A.D. 1942.

DONALD PIPER BY EUGENE PIPER, HIS NEXT FRIEND, Plaintiff-Appellant,	)	
vs.	)	APPEAL FROM THE CIRCUIT COURT OF BUREAU COUNTY, ILLINOIS.
ESTHER L. SPERONI, EXECUTRIX OF THE WILL OF PETER J. SPERONI, DECEASED, Defendant-Appellee.	)	

WOLFE,-- J.

Donald Piper, by Eugene Piper, his next friend, started a suit against Peter J. Speroni for personal injuries he received when a Ford car in which he was riding, ran into the rear of the defendant's truck which was standing on the improved paved highway in Bureau County, Illinois. Since the beginning of the suit, Donald Piper has become of age and Peter J. Speroni has died. Esther L. Speroni, the Executrix

Gen. No. 3212 Agenda No. 21.

IN THE

APPELLATE COURT OF ILLINOIS

FOR THE SECOND DISTRICT.

OCTOBER TERM, A.D. 1921.

DONALD PIPER BY SUSAN PIPER, HIS NEXT FRIEND, Plaintiff-Appellant,	
vs.	APPEAL FROM THE CIRCUIT COURT OF BUREAU COUNTY, ILLINOIS.
ESTHER F. BERNOW, ADMINISTRATRIX OF THE EST. OF PETER I. BERNOW, DECEASED, Defendant-Appellee.	

NOTE, -- 1.

Donald Piper, by Susan Piper, his next friend, started a suit against Peter I. Bernow for personal injuries he received when a part car in which he was riding, was into the rear of the defendant's truck which was standing on the improved paved highway in Bureau County, Illinois. Since the beginning of the suit, Donald Piper has become of age and Peter I. Bernow has died. Esther L. Bernow, the executrix

of his will, has been joined as defendant to the suit.

The case was tried on the second amended complaint containing four counts charging (1) That servants of defendant negligently and carelessly permitted the said truck to stop and stand on the highway thirty minutes and upwards without any lights or flares, or other signalling device, ahead or to the rear of the said truck. (2) That defendant violated Section 185 of Chapter 95½, Illinois Bar Statutes, 1939, prohibiting persons from stopping, parking, or leave standing any vehicle upon the paved or improved traveled part of the highway when it is practical to stop, park or so leave such vehicle off of such part of such highway, etc. (3) That defendant violated Section 200 of the Uniform Act Regulating Traffic on Highways (Chapter 95½, Section 200, of the Illinois Revised Statutes of 1939, State Bar Edition) providing that:

"When upon any highway in this State, during the period from sunset to sunrise, every motorcycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights, or lights of a yellow or amber tint, visible at least five hundred (500) feet in the direction toward which each motorcycle or motor vehicle is proceeding, and each motor vehicle, trailer, or lamp which shall be so situated as to throw a red light visible for at least

of his will, has been joined as defendant to the suit.

The case was tried on the second amended complaint containing four counts charging (1) That servants of defendant negligently and carelessly permitted the said truck to stop and stand on the highway thirty minutes and upwards without any lights or flares, or other signalling device, ahead or to the rear of the said truck. (2) That defendant violated Section 185 of Chapter 95½, Illinois Bar Statutes, 1939, prohibiting persons from stopping, parking, or leave standing any vehicle upon the paved or improved traveled part of the highway when it is practical to stop, park or so leave such vehicle off of such part of such highway, etc. (3) That defendant violated Section 200 of the Uniform Act Regulating Traffic on Highways (Chapter 95½, Section 200, of the Illinois Revised Statutes of 1939, State Bar Edition) providing that:

"When upon any highway in this State, during the period from sunset to sunrise, every motorcycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights, or lights of a yellow or amber tint, visible at least five hundred (500) feet in the direction toward which such motorcycle or motor vehicle is proceeding, and each motor vehicle, trailer, or lamp which shall be so situated as to throw a red light visible for at least

five hundred (500) feet in the reverse direction," (4) That defendant did then and there so carelessly, recklessly and negligently drive, manage and control the said truck that Donald Piper, while exercising ordinary care, ran into the said truck and was seriously injured. Piper sustained permanent injuries to his pelvis and right leg from which he will be disabled for life.

Esther L. Speroni filed her answer to the complaint in which she denied that Peter J. Speroni, either by himself, or his servants or agents, was in any way or respect, negligent or careless, as alleged in plaintiff's complaint. She denies that the truck, in question, stood or was permitted to stand upon the highway for a long space of time without any lights, or without flares or signal devices being placed upon the highway, as alleged therein. She denies that the plaintiff was in the exercise of ordinary care for his own safety, but charges that he was wilfully and wantonly driving at a speed in excess of fifty miles per hour. The answer admits that the accident happened, but she denies any and all responsibility for plaintiff's damages.

The case was tried before a jury who found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled. Judgment was entered in favor of the defendant, and the costs of the suit

five hundred (500) feet in the reverse direction." (4) That defendant did then and there so negligently, recklessly and negligently drive, manage and control the said truck that herein figure, with exceptions ordinary care, and into the said truck and was seriously injured. Plaintiff sustained permanent injuries to his pelvis and right leg from which he will be disabled for life.

Defendant R. Spencer filed his answer to the complaint in which he denied that Peter A. Dawson, either by himself, or his servants or agents, was in any way at fault, negligent or careless, or failed in plaintiff's complaint, and denies that the truck, in question, ever was permitted to stand upon the highway for a long space of time without any lights, or without flares or signal devices being placed upon the highway, as alleged therein. He denies that the plaintiff was in the exercise of ordinary care for his own safety, but charges that he was willfully and recklessly driving at a speed in excess of fifty miles per hour. He answer admits that the accident happened, but his denies any and all responsibility for plaintiff's damage.

The case was tried before a jury who found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled. Judgment was entered in favor of the defendant, and the costs of the suit

assessed against the plaintiff. It is from this judgment that the plaintiff has perfected an appeal to this Court.

The appellant insists that the Court erred in giving defendant's instructions numbers 8, 18, 19, 20, 21, 23, 24, 25, 26, 27, 30, 31 and 32, and each and all of them.

The evidence in this case discloses that on the evening of April 28, 1940, between 7:30 and 8:00 p.m. the defendant Speroni's agents and servants were driving a large truck on the highway west of the City of Van Orin in Bureau County, Illinois; that this truck consisted of what is commonly called a tractor and trailer, and was heavily loaded with carnival equipment; that the truck had stopped at the Village of Van Orin; that as they proceeded eastward, the driver noticed that the engine was not working properly, and that the lights went out and the engine stopped running, and the truck was stopped on the paved part of the highway. Donald Piper and several other boys in Donald's Ford car had planned to go to Mendota, and were driving along the same road and crashed into the rear of the defendant's truck. The evidence shows that the truck had stood upon the highway for several minutes at least, without any effort on the part of the defendant, Speroni's servants to put out flares, or any other warning lights to warn people, using the same road, of

assessed against the plaintiff. It is from this judgment that the plaintiff has perfected an appeal to this Court.

The appellant insists that the Court erred in giving defendant's instructions numbers 5, 18, 19, 20, 21, 23, 24, 25, 26, 27, 30, 31 and 32, and each and all of them.

The evidence in this case discloses that on the evening of April 24, 1940, between 7:30 and 8:00 p.m. the defendant Doremus's agents and servants were driving a large truck on the highway west of the city of Van Orin in Lawson County, Illinois; that this truck consisted of what is commonly called a tractor and trailer, and was heavily loaded with carnival equipment; that the truck had stopped at the village of Van Orin; that as they proceeded eastward, the driver noticed that the engine was not working properly, and that the lights went out and the engine stopped running, and the truck was stopped on the paved part of the highway. Donald Piper and several other boys in Donald's Ford car had planned to go to Mendota, and were driving along the same road and crashed into the rear of the defendant's truck. The evidence shows that the truck had stood upon the highway for several minutes at least, without any effort on the part of the defendant, Doremus's servants to put out flares, or any other warning lights to warn people, using the same road, of

the danger that lay ahead of them; that there was a search made for the flares, but they could not be found until after the accident occurred. It developed later that there were flares on the truck, but they were not in their proper place, so they could not be used in the emergency which arose when the truck stopped on the paved part of the highway. These facts are clearly established by the testimony of the witnesses in the case.

It is argued strenuously by the appellee that the Court erred in not directing a verdict for the defendant. Other evidence developed in this case, not quoted here. This case was certainly one to be submitted to a jury under proper instructions.

Defendant's instruction No. 8 is a peremptory one, and has been criticized both by Supreme and Appellate Courts, Molloy vs. Chicago Rapid Transit Company, 335 Ill. 164.

Defendant's instruction No. 19 also directs a verdict, and is erroneous. It wholly omits the negligence, if any, of the defendant's agents in stopping upon the highway in the first place, or not trying to park the truck on the shoulder, which the evidence shows was fairly solid, and about fourteen feet wide at the place where the collision occurred. It also ignores the fact that there was a gravel side-road close to where the truck stopped.

the danger that lay ahead of them; that there was a search made for the flares, but they could not be found until after the accident occurred. It developed later that there were flares on the truck, but they were not in their proper place, so they could not be used in the emergency which arose when the truck stopped on the paved part of the highway. These facts are clearly established by the testimony of the witnesses in the case.

It is argued strenuously by the appellee that the Court erred in not directing a verdict for the defendant. Other evidence developed in this case, not quoted here. This case was certainly one to be submitted to a jury under proper instructions.

Defendant's instruction No. 2 is a peremptory one, and has been criticized both by Supreme and Appellate Courts, Molloy vs. Chicago Rapid Transit Company, 355 Ill. 164.

Defendant's instruction No. 13 also directs a verdict, and is erroneous. It wholly omits the negligence, if any, of the defendant's agents in stopping upon the highway in the first place, or not trying to park the truck on the shoulder, which the evidence shows was fairly solid, and about fourteen feet wide at the place where the collision occurred. It also ignores the fact that there was a gravel side-road close to where the truck stopped.

Instruction No. 20 also directs a verdict, and is erroneous and excludes from the consideration of the jury whether the defendants violated the Statute in stopping and parking their car upon the pavement when it was practical to leave such vehicle off the highway, and also failing to exhibit proper lights or flares.

Instruction No. 21 is as follows: "You are instructed that if you believe from the preponderance of the evidence that the plaintiff, Donald Piper, and Kenneth Tower, Winfield Odell and Leland Wolf, who were riding in plaintiff's car at the time of the accident in question, were all engaged in a joint enterprise, then the plaintiff would be chargeable with the negligence, if any, of either Kenneth Tower or Winfield Odell, or Leland Wolf, which contributed in any degree to the collision described in the evidence in this case." The vice of this instruction is that there was no evidence in the record to sustain such an instruction, and further the jury are not told what a joint enterprise is, but leave them wholly to their ideas what a legal, joint enterprise may be.

Defendant's instruction No. 25 is as follows: "You are instructed that if you believe from the evidence, under the instructions of the Court, that the plaintiff, Donald Piper, was suddenly and without any negligence or fault on the part

Instruction 3. It also directs a verdict, and is erroneous and excludes from the consideration of the jury whether the defendants violated the statute in employing and putting their engines the parties, and was practical to leave such vehicle off the highway, and also failing to exhibit proper lights or flares.

Instruction No. 21 is as follows: "You are instructed that if you believe from the preponderance of the evidence that the plaintiff, Donald Ziser, and Earnest Brown, driving Odell Lee Island mail, was more nearly in plaintiff's car if the time of the accident in question, were all engaged in a joint adventure, then the plaintiff would be chargeable with the negligence, if any, of either Earnest Brown or Nicholas Odell, or Island mail, which contributed in any degree to the collision mentioned in the evidence in this case." The vice of this instruction is that there was no evidence in the record to sustain such an instruction, and further the jury are not told what a joint enterprise is, but leave them wholly to guess what a legal joint enterprise may be.

Defendants instruction No. 20 is as follows: "You are instructed that if you believe from the evidence, under the instructions of the court, that the plaintiff, Donald Ziser, the additiy had without any negligence or fault on the part

of Peter J. Speroni, personally, or through his employees placed in a position of danger, then in order to charge Peter J. Speroni with the duty to avoid injuring Donald Piper, Donald Piper must show, by a preponderance of the evidence that the circumstances were such that Peter J. Speroni, personally or through his employees, had time and opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty and a reasonable opportunity to perform it. And if you further believe from the evidence, under the instructions of the Court, that the circumstances as shown by the evidence did not charge the said Peter J. Speroni with the duty as thus defined, or if you believe from the evidence, under the instructions of the Court, that the employees of said Peter J. Speroni did not have a reasonable opportunity to perform, by the exercise of that degree of care elsewhere required in these instructions, such duty as thus defined, then you should find the defendant, not guilty." This instruction is misleading. Two of defendant's employees, one called as a witness for the plaintiff, and the other for the defendant, testified that the truck in question unlighted stood upon the pavement for several minutes. The danger, if any, that confronted Donald Piper was the unlighted truck

of Peter G. Spencer, personally, or through his employees placed in a position of danger, then to order to charge Peter G. Spencer with the duty to avoid injuring Donald Piper, Donald Piper must show, by a preponderance of the evidence that the circumstances were such that Peter G. Spencer, personally or through his employees, had time and opportunity to have conducted, by the exercise of ordinary care, of the facts giving rise to such duty and a reasonable opportunity to perform it. And if you further believe from the evidence, under the instructions of the Court, that the circumstances as shown by the evidence did not charge the said Peter G. Spencer with the duty as thus defined, or if you believe from the evidence, under the instructions of the Court, that the employees of said Peter G. Spencer did not have a reasonable opportunity to perform, by the exercise of that degree of care elsewhere required in these instructions, such duty as thus defined, then you should find the defendant, not guilty." This instruction is misleading. Two of defendant's employees, one called as a witness for the plaintiff, and the other for the defendant, testified that the truck in question unlighted stood upon the pavement for several minutes. The lamper, it was, that confronted Donald Piper was the unlighted truck

upon the pavement aggravated by the fact that a car with bright lights was coming toward him. The collision occurred, and the plaintiff was injured. We think the burden of proof was not upon the plaintiff to show that the defendant's servants had time to put out flares, but was upon the defendant to show that they did not have time to put out the flares after the car stopped, and before the collision occurred.

The defendant's instruction No. 27, begins as follows: "You are instructed that contributory negligence is such negligence on the part of Donald Piper as helped to produce the injuries complained of." Then it concludes that under certain circumstances, "Donald Piper cannot recover in this action." We think the quoted part of this instruction would lead one to believe that the plaintiff was guilty of contributory negligence, and therefore should not have been given.

Defendant's instruction No. 31 has been criticized in Cassens vs. Tillberg, 294 Ill. App. 168 and in West Chicago Railroad Company vs. Petters, 196 Ill. 298. Defendant's instruction No. 32 has been criticized frequently for the use of the word "could have avoided the injuries etc.," instead of the word "would." Cassens vs. Tillberg supra, Gehrig vs. Chicago and Alton Railroad, 201 Ill. App. 293.

The Court submitted to the jury a special finding

upon the pavement occasioned by the fact that a car with traffic lights was coming toward him. The collision occurred, and the plaintiff was injured. To place the burden of proof was not upon his plaintiff to show that the defendant's servants had time to put out flares, but was upon the defendant to show that they did not have time to put out the flares after the car stopped, and before the collision occurred.

The defendant's instruction No. 2, reads as follows: "You are instructed that contributory negligence is such negligence on the part of Donald Tiger as helped to produce the injuries complained of." This is nothing but under certain circumstances, "Donald Tiger cannot recover in this action." In this the quoted part of this instruction would lead one to believe that the plaintiff was guilty of contributory negligence, and therefore should not have been given.

Defendant's instruction No. 21 has been criticized in Cassaza vs. Railway, 214 Ill. App. 103 and in Pat Chicago Railroad Company vs. Pastore, 171 Ill. 620. Defendant's instruction No. 27 has been criticized recently for the use of the word "could have avoided the injuries etc.," instead of the word "would." Lassens vs. Railway Co., Cassel vs. Chicago and Alton Railway, 241 Ill. 414, 420.

The Court submitted to the jury a special finding

as follows: "Do you find that the plaintiff, Donald Piper, was in the exercise of due care and caution for his own safety, and the safety of his automobile at the time of the collision in question?" They were instructed to answer this question 'yes,' or 'no.' When the jury returned in Court with their verdict, this special interrogatory was answered, 'no,' but not signed by the foreman, or any of the jurors. It is insisted by the appellee that this is not an answer to the question, and the appellant insists that it is. We do not pass upon this question, as we consider it immaterial, as the case will have to be reversed and remanded for a new trial on account of the erroneous instructions.

Defendant's given instructions 8, 18, 19, 20, 23, 24, 25, 26, 27 and 32 either directly, or indirectly directed a verdict and were peremptory in their nature. Eight of them were on the subject of contributory negligence of the plaintiff. Our Courts have held frequently that the giving of so many instructions on one subject is misleading to the jury, and should not be given. In Williams vs. Stearns 256 Ill. App. 425, it is held to be reversible error to give so many instructions on contributory negligence.

Defendant's instructions number 18, 19, 21 and 26

as follows: "Do you find that the plaintiff, Donald Piper, was in the exercise of due care and caution for his own safety, and the safety of his automobile at the time of the collision in question?" They were instructed to answer this question 'yes,' or 'no.' When the jury returned in Court with their verdict, this special interrogatory was answered, 'no,' but not signed by the foreman, or any of the jurors. It is intimated by the appellee that this is not an answer to the question, and the appellant insists that it is. We do not pass upon this question, as we consider it immaterial, as the case will have to be reversed and remanded for a new trial on account of the erroneous instructions.

Defendant's given instructions 6, 18, 19, 20, 23, 24, 25, 26, 27 and 32 either directly, or indirectly directed a verdict and were peremptory in their nature. Eight of them were on the subject of contributory negligence of the plaintiff. Our Courts have held frequently that the giving of so many instructions on one subject is misleading to the jury, and should not be given. In Williams vs. Stearns 256 Ill. App. 425, it is held to be reversible error to give so many instructions on contributory negligence.

Defendant's instructions number 18, 19, 21 and 22

refer to the collision in question, as an accident. Our Courts have defined an accident as an injury suffered without fault or liability, Peters vs. Madigan, 262 Ill. App. 424; Cornwell vs. Bloomington Businessmen's Association, 163 Ill. App. 461; Streeter vs. Humrichouse, 357 Ill. 234. These instructions should not have been given.

The testimony in regard to the inspection of the Speroni truck, made by Mr. Conkling on the morning of the day of the collision, we think was proper, and even if it were not, we cannot see how it would mislead the jury in any way.

For the reasons stated concerning the erroneous instructions, the judgment of the trial court is reversed and the cause remanded.

Reversed and Remanded.

refer to the collision in question, as an accident. Our Courts have defined an accident as an injury resulting without fault or liability, Peters vs. Redfern, 208 Ill. 199. Wright Cornwell vs. Bloomington Realtessaurts Association, 167 Ill. App. 481; Stoeber vs. Murphy-Nye, 327 Ill. 524. These instructions should not have been given.

The testimony in regard to the instruction of the second trial, made by Mr. Coghlan on the morning of the day of the collision, we think was improper, and the ruling thereon, we cannot see how it could obtain the jury's attention.

In the reasons stated concerning the erroneous instructions, the judgment of the trial court is reversed and the cause remanded.

Reversed and Remanded.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February ~~October~~ Term, A. D. 1943.

General No. 9360

Agenda No. 7.

Jennie Hish, W. J. Rogers, Lena Wessel, Harry Doyle, Nora Hinton, Franklin Whitlatch, Celia Kelly, John Milligan, C. V. York, Lottie F. Miller, Helen Peters, Nelson D. Jones, John Stanley, Bertha Reynolds, Daisie Forsythe, Chas. Walker, Laura Walker, Ely Woolen, E. B. Burrus, Ed McDaniel, Millie Brown, Osee Toothman, Hattie Carlisle, Ed Logan, Mrs. Samuel Young, Gilbert Mills, Edward Ruff, Odie Sarver, Owen Sarver, Floyd Davis, Nora Oller, Lizzie Ginger, Evan Douthit, Ray Jarnagin, R. L. Donaldson, Charles Howse, Ed. Berkshire and Laura May Dow,
Plaintiffs-Appellants

vs.

The County of Shelby,
Defendant-Appellee

Appeal from Circuit Court Shelby County.

RIESS, P. J.:

Plaintiff-Appellants, Jennie Hish and 37 other blind persons residing in Shelby County, Ill., whose names had been duly placed upon the blind pension roll of that County, filed suit against the County of Shelby for the recovery of the respective sums of $92.00 alleged to be due each of them as blind pension benefits payable at the rate of $1.00 per day for the months of July, August and September of the year 1941, by virtue of the provisions of an Act for the relief of the blind, approved May 11, 1903, and in force July 1st, 1903, and amendments thereto, (Chap. 23, Secs. 279-287a inc. Ill. Rev. Stats., 1939) as subsequently amended by the 62nd General Assembly in 1941, (Chap. 23, Secs. 285, 286, Ill. Rev. Stats., 1941) which latter amendment provided for monthly payments instead of quarterly payments of blind benefits accruing under the terms of said Act as so amended. The case was tried by the Circuit Court without a jury and a judgment was entered in favor of the defendant County on all of the claims, from which findings and judgment of said court all of the plaintiffs have perfected appeals to this court.

February term, A. D. 1960.

General No. 3980 Appeals No. 7.

Louis Blum, C. A. Bowers, Leon Conrad, Harry Cole, Max Eisen, Franklin Fairleigh, Chris Kotis, Jess Miller, D. T. Ford, Lottie P. Miller, Helen Pearce, Eileen G. Jones, Jay Stanley, Martha Sprague, Nellie Pearce, Geo. Tolar, Henry Tolar, Ely Wolfe, T. E. Burns, Ed Shepard, Willis Swan, Owen Tallman, Willis Shoblin, Ed Lagan, Mrs. Conrad Young, Gulbert Kelly, Albert Hurt, Lois Weaver, Owen Carter, Jesse Davis, Mrs. Olive Little Stamper, Wren Tomlin, Jay Lockwood, W. E. Tomlinson, Charles Jones, Ed. Sweazie and Henry Hay Jr.

Plaintiffs-Appellants

vs.

The County of Shelby,
Defendant-Appellee

APPEAL, P. J.:

Plaintiff-appellants, twenty men and 27 other other persons residing in Shelby County, Ill., whose names had from July August when its blind pension roll of that County, filed suit against the County of Shelby for the recovery of the respective sums of $20.00 alleged to be due each of them as blind pension benefits payable at the rate of $1.00 per day for the months of July, August and September of the year 1959, by virtue of the provisions of an act for the relief of the blind, approved May 11, 1959, and in force July 1st, 1959, and amendatory thereto, (Chap. 23, Secs. 279-279a inc. Ill. Ann. Stats., 1959) as supplementally amended by the blind assistance act in 1960. (Chap. 23, Secs. 4b, 4bb, Ill. Ann. Stats., 1960) which latter amendment provided for monthly payments instead of quarterly payments of blind benefits according under the terms of said act as so amended. The case was tried by the Circuit Court without a jury and a judgment was entered in favor of the defendant County on all of the claims, from which findings and judgment of said court all of the plaintiffs have perfected appeals to this court.

The case was heard upon the pleadings and a written stipulation of facts signed by respective counsel and duly admitted in evidence. No further evidence was offered by any of the parties. It appears from the recitals of said stipulations that each of the plaintiffs had been duly examined and found to be blind and certified to be lawfully entitled to receive relief benefits at the rate of $365 per annum under the provisions of said Act and that their names were duly placed upon the blind pension rolls of said County at various dates between the years of 1915 and 1941. In paragraph 8 thereof it was stipulated "That each of said plaintiffs herein was so determined to be blind and became entitled to said benefit from and after the first day of each of the months of January, April, July and October thereafter until July 1, 1941, and from July 1, 1941, on the first day of each month thereafter."

All of the County orders were made "payable out of moneys appropriated by the County Board for the relief of the blind," and had been duly issued and signed by the County Clerk and countersigned by the County Treasurer of said County, covering benefits at said statutory rate of one dollar per day payable to said respective blind pensioners or bearer, in quarterly payments on the first days of January, April, July and October of each year during the period for which their respective names had been so carried on said pension roll prior to and on July 1, 1941. Following the dates of their respective issuance, all orders were delivered to and collected by the various plaintiffs.

Paragraph 10 stipulated "That on the 1st day of July, 1941, the respective plaintiffs herein were respectively issued County orders by the County Clerk of Shelby County, Illinois, said orders being in words and figures as follows, to wit:

"No.---------- County Clerk's Office $91.00
TREASURER OF
Shelby County, Ill. July 1, Term 1941
PAY---------- OR BEARER

The Sum of Ninety-One and no/100 Dollars OUT OF THE MONEYS IN THE TREASURY APPROPRIATED BY THE County Board FOR THE RELIEF OF THE BLIND, FOR THE QUARTER ENDING JUNE 30, 1941.

FLOYD LOGUE

County Clerk

Countersigned

J. Frank Stillwell, Treasurer.

and that the payees named in each respective order are the plaintiffs herein."

Paragraph 12 of stipulation reads as follows: "That on the 1st day of October 1941, the respective plaintiffs herein were respectively issued County orders by the County Clerk of Shelby County, Illinois, said orders being in words and figures as follows, to wit:

"No.-------- County Clerk's Office $31.00

TREASURER OF

Shelby County, Ill. October 1, Term, 1941.

PAY---------- OR BEARER

The Sum of Thirty-One and no/100 Dollars OUT OF THE MONEYS IN THE TREASURY APPROPRIATED BY the County Board FOR THE RELIEF OF THE BLIND, FOR THE MONTH ENDING OCTOBER 31, 1941.

FLOYD LOGUE

County Clerk

Countersigned by

J. Frank Stillwell, Treasurer

and that the payees named in each respective order are the plaintiffs herein."

It was recited in Paragraph 14 of said stipulations "That no other sum of money was paid by the defendant herein to the respective plaintiffs herein other than according to respective orders mentioned in paragraphs ten and twelve hereof during the period between July 1, 1941, and October 1, 1941."

The fees of sixty-one and no/100 Dollars per is ordered in the
TEMPORARY APPROPRIATION OF THE County Board FOR THE HOLDER OF THE
RIGHT, THE THE COUNTY BOARD THIS 20, 1941.

Floyd Lenz

County Clerk

Countersigned

J. Frank Williams, Treasurer.

and that the payees named in such respective order are the plaintiffs
herein."

Paragraph IV of stipulation reads as follows: "That on
the 1st day of October 1941, the respective plaintiffs herein were
respectively issued County orders by the County Clerk of Shelby
County, Illinois, said orders being in words and figures as follows,
to wit:

"No.-------- County Clerk's Office $61.00

TREASURY OF

Shelby County, Ill. October 1, 1941.

PAY---------- OR ORDER

The sum of Sixty-One and no/100 Dollars out of the General
IN THE TEMPORARY APPROPRIATION OF the County Board
FOR THE HOLDER OF THE RIGHT, THE THE COUNTY BOARD THIS 20, 1941.

Floyd Lenz

County Clerk

Countersigned by

J. Frank Williams, Treasurer

and that the payees named in such respective order are the
plaintiffs herein."

It was proved in paragraph 14 of said stipulation:
"That no other sum of money was paid by the defendant herein to
the respective plaintiffs herein other than according to respective
orders mentioned in paragraphs two and twelve hereof during the
period between July 1, 1941, and October 1, 1941."

Following the names of each of the 38 plaintiffs which are listed in Paragraph 17, appears the stipulated dates during the years from 1915 to 1941 on which each plaintiff had been certified to the County Board by the County Clerk for blind pension benefits and also the dates of the first subsequent day of each quarter of the year when the respective plaintiffs received their first County orders. Paragraph 17 concludes as follows: "That each of said plaintiffs thereafter, on the 1st day of January, April, July and October of each year thereafter until July 1, 1941, that being the date of the last order issued for a quarterly payment, received an order drawn by the County Clerk in payment of said Blind Pension."

Paragraph 16 stipulated "That on and after July 1, 1916, and quarterly thereafter until July 1, 1941, that being the date of the last order issued for a quarterly payment, orders were drawn and issued by the County Clerk in payment of Blind Pension to the remainder of said plaintiffs not named in Paragraph 15, on which was designated that said orders were in payment of said Blind Pension for the quarter ending on or about on the date of said order, i.e., for the quarter preceding the date of said orders."

Paragraph 15, so referred to, covered the orders in payment of blind pensions prior to July 1, 1916, as to six of said named pensioners concerning which it was stipulated that the orders issued prior to said date recited "that said orders were in payment of said blind pension for the quarter ending three months after the date of said order, i.e., for the quarter ensuing." The names of the six parties so mentioned in said Paragraph 15 also appear in the certified list and among the 38 plaintiffs whose names are set forth in Paragraph 17 of stipulations, and who received orders for quarterly payments which recited (Paragraph 16, supra) that they were "for the quarter preceding the date of said orders," which were so issued quarterly during the entire 25 year period after July 1, 1916, to and including July 1, 1941.

Following the names of each of the 38 plaintiffs which are listed in Paragraph 17, appears the stipulated dates during the years from 1919 to 1941 on which each plaintiff had been certified to the County Board by the County Clerk for bills payment benefit, and also the dates of the first subsequent day of each quarter of the year when the respective plaintiffs received their first County orders. Paragraph 17 continues as follows: "That each of said plaintiffs thereafter, on the 1st day of January, April, July and October of each year thereafter until July 1, 1941, that being the date of the last order issued for a quarterly payment, received an order drawn by the County Clerk in payment of said Blind Pension."

Paragraph 18 stipulated "That on and after July 1, 1919, and quarterly thereafter until July 1, 1941, but being for a the of the last order issued for a quarterly payment, orders were drawn and issued by the County Clerk in payment of Blind Pension to the remainder of said plaintiffs not named in Paragraph 16, on which was designated that said orders were in payment of said Blind Pension for the quarter ending on or about on the date of said order, i.e., for the quarter preceding the date of said orders."

Paragraph 19, as referred to, covered the orders in payment of other pensions prior to July 1, 1919, as to all of said named pensioners commencing with it was stipulated that the orders issued prior to said date recited "that said orders were in payment of said blind pension for the quarter ending three months after the date of said order, i.e., for the quarter ending." The dates of the 4th periods as mentioned in said Paragraph 19 also appear in the certified list set among the 38 plaintiffs whose names are set forth in Paragraph 17 of stipulations, and who received orders for quarterly payments which recited (Paragraph 19 supra) that the orders for the quarter preceding the date of said orders," which were to issued quarterly during the entire 22 year period after July 1, 1919, to and including July 1, 1941.

Chap. 23, Sec. 280 Ill. Rev. Stat. 1939, provided as follows: "That all male persons over the age of 21 years and all female persons over the age of 18 years, who are declared to be blind, in the manner hereinafter set forth, and who come within the provisions of this Act, shall receive as a benefit three hundred sixty-five dollars per annum, payable quarterly, upon warrants properly drawn on the treasurer of the county of which such person or persons are residents." (1903, May 11, Laws 1903, p. 138, No. 2; Laws 1915, p. 256, No. 1; Laws 1923, p. 174, No. 1; 1927, June 24, Laws 1927, p. 202, No. 1.) Section 285 of said chapter contained the following provision: "The county clerk shall register the name, address and number of applicant, and date of the examination of each of the applicants who has been so determined to be entitled to said benefit, at each meeting of such county commissioners or county supervisors of the county, he shall certify to the county commissioners or county supervisors of the county, the names and residences of each applicant, so determined by the examiner to be entitled to said benefit ~~XXXX~~ and such applicant shall be entitled to said benefit from and after the first day of the months of January, April, July and October, thereafter, to be provided for as set forth in section 8 of this article. (1903, May 11, Laws 1903, p. 138, No. 7; 1915, June 25, Laws 1915, p. 256, No. 1.) in force July 1, 1915."
The 62nd General Assembly in 1941 amended said section 280 by changing the words "payable quarterly" so as to read "payable monthly" and re-enacting the same as so amended in an Act which was approved by the Governor on July 17, 1941. Section 285 was also amended at that time so as to conclude as follows "and such applicant shall be entitled to said benefit from and after the first day of each month thereafter, to be provided for as set forth in section 8 of this Act." (Chap. 23, Charities Secs. 280, 285, Ill. Rev. Stats. 1941.)
Said Act was passed by the General Assembly prior to July 1, 1941, and signed by the Governor on July 17, 1941, and therefore became effective on the date of such approval by the Governor. Board of

Chap. 46, Sec. 46a Ill. Rev. Stat. 1959, provides as follows: "Each all male persons over the age of 21 years and all female persons over the age of 18 years, who are declared to be blind, in the manner hereinafter set forth, and who meet within the provisions of this act, shall receive as a benefit three hundred sixty-five dollars per annum, payable quarterly, upon warrants drawn on the treasurer of the county of which such persons or persons are residents." (1953, Act 18, Sec. 1; 1957, No. 8; Laws 1959, p. 888, No. 1; Laws 1961, p. 174, No. 1; 1967, June 14, Laws 1967, p. 2[illegible], No. 1.) Section 46 of said chapter contains the following provision: "The county clerk shall register the name, address and number of applicant, and date of the examination of each of the applicants who has been so determined to be entitled to aid benefit, at each meeting of such county commissioners or county supervisors of the county, he shall certify to the county commissioners or county supervisors of the county, the name and residence of each applicant, so determined by the examiner to be entitled to aid benefit XXXXX and such applicant shall be entitled to said benefit from and after the first day of the month of January, April, July and October, thereafter, so as provided for in each fiscal in section 8 of this article. (1953, Act 18, Sec 1; 1957, No. 7; 1959, June 23, Laws 1959, p. 888, No. 1.) in force July 1, 1959."

The court noticed judicially in 1961 amended said section 46 by changing the words "physically qualified" so as to read "physically capable" and re-enacting the same as so amended in an act which was approved on the December 28 July 17, 1961. Section 46 was also amended at that time so as to conclude as follows "and such applicant shall be entitled to said benefit from and after the first day of each month thereafter, to be provided for as in section 8 of this act." (Chap. 46, Statutes Ann. 46a, 1962, Ill. Rev. Stats. 1961.)

Said act was passed by the General Assembly prior to July 1, 1961, and signed by the Governor on July 17, 1961, and therefore became effective on the date of such approval by the Governor. Said at

Education v. Morgan County, 316 Ill. 143, 147 N.E. 34; People v. Kramer, 328 Ill. 512, 160 N.E. 60; People v. Village of Oak Park, 372 Ill. 488, 24 N.E. 2d 571.

Appellants assign error on the part of the trial court in finding the issues in favor of the defendant and in entering judgment against the plaintiffs in bar of action and contend that the payments made on July 1, 1941, to each plaintiff covered "the quarter ending on June 30, 1941," as therein expressly recited and that the findings and judgment should have been in favor of each of the plaintiffs for the period of 92 days included in the months of July, August and September, 1942, in the sum of $92 and costs.

From the stipulations, it appears that the last quarterly orders drawn by the defendant County and delivered to each of the plaintiffs showed on their face that they were issued in payment "For the relief of the blind, for the quarter ending on June 30, 1941." It was further stipulated that no orders were drawn and delivered thereafter until October 1, 1941, which latter orders recited that they were for the month of October. A prima facie case was thus clearly made by the plaintiffs as to non-payment of benefits due each of them for the months of July, August and September, comprising 92 days, at the rate of one dollar per day. The provisions of the Act for the relief of the blind having been complied with, the right to receive such benefits had become a vested right in each of the plaintiffs. Proffitt v. County of Christian, 370 Ill. 530, 19 N. E. 2d 345. A right of action accrued in favor of each of the plaintiffs as such blind pensioners for the recovery of a judgment against the County for unpaid benefits. Proffitt v. County of Christian, supra. The defendant, not contesting right of plaintiffs to recover unpaid benefits, has plead payment thereof. Payment is a matter of affirmative defense, and in the absence of evidence in support thereof, it will be presumed that it has not been made. Scown v. County of Cook, 199 Ill. App. 351; Beggs v. Chicago Bonding & Surety Co., 207 Ill. App. 621; Tribune v. McCarthy, 201 Ill. App. 586. The fact of payment as an affirmative defense must be proven by a preponderance of the evidence.

Kimmelman v. Morgan County, 124 Ill. App. 347 (1st. Dist. 1924); Hoggle v. Lemmon, 324 Ill. App. 120 (4th. Dist. 1944); Jarvis v. Village of Lake Zurich, 324 Ill. App. 44 (2d. Dist. 1944).

Appellants contend, error on the part of the trial court in finding the issues in favor of the defendant and not in entering judgment against the plaintiffs in spite of motions and evidence that the judgments made on July 1, 1941, by Judge Claudius Spencer "the further ruling on June 30, 1943," at Sterling respectively decided and that the findings and judgments should have been in favor of the plaintiffs for the period of 90 days included in the months of July, August and September, 1941, in the sum of 90 and more.

From the stipulations, it appears that the Lee County Court entered orders of the defendant County and delivered to each of the plaintiffs notices on July 1st and they were issued in pursuance "for the relief of the aforesaid, for the counter motion on June 30, 1943." It was further stipulated that no orders were given and delivered therefrom until October 1, 1941, which latter orders provided that they were for the month of October. A motion there was then already made by the plaintiffs as to non-payment of monthly dog tags of Lee for the months of July, August and September, amounting to 90, at the rate of one dollar per day. The provisions of the law for the relief of the blind having been complied with, the right to receive such monthly and because a vested right is made of the municipality. Pratt v. County of Cortland, 4Ill. 130, 14 N. E. 34 (1888). A right of action accrued in favor of each of the plaintiffs as each other ownership for the recovery of a judgment against the County for moneys monthly. Pratt v. County of Cortland, supra. The defendant, not contesting right of plaintiffs to receive monthly benefits, has raised jurisdictional question. Tendered is a motion of affirmative defense; was in the nature of evidence in support thereof, it will be presumed that it was not been made. Brown v. County of Cook, 329 Ill. App. 221; Hoggle v. Lemmon, 324 Ill. App. 120; Jarvis v. Village of Lake Zurich, 324 Ill. App. 44; Kimmelman v. Morgan County, 124 Ill. App. 347. The test of sufficiency of an affirmative defense must be proven by a preponderance of the evidence.

McGovern v. City of Chicago, 281 Ill. 264, 118 N.E. 3; Swift & Co. v. Mutter, 115 Ill. App. 374; Boone v. The Estate of Bliss, 98 Ill. App. 341; Laswell v. Gahan, 122 Ill. App. 513; Henry v. Britt, 197 Ill. App. 167.

The stipulations show that for the period of a quarter of a century extending from July 1, 1916, to and including July 1, 1941, the quarterly orders were regularly issued for blind pension benefits to various plaintiffs, on all of which orders it was designated "that said orders were in payment of said blind pension for the quarter preceding the date of said orders." Language could not be clearer in supporting and setting forth the specific intent and understanding of the parties, and in showing what was actually done and intended by the county officials from their own records and recitals as evidenced by hundreds of warrants so issued by the County Clerk and duly countersigned by the County Treasurer who paid the same to the various plaintiff beneficiaries out of the money in the county treasury appropriated for the relief of the blind. It is not shown that the defendant had claimed that any mistake was made during the entire period that the orders were so drawn, nor does it appear from the whole of the record as we view it that any mistake was so made by the parties. The amount of each of the first orders delivered to the respective plaintiffs on the first day of the quarter following their certification on the pension roll after 1916 is not shown. It is significant, however, that in six instances the orders issued by the defendant County prior to July 1, 1916, specifically recited in language contrary to that of all subsequent orders that they were payment in advance for the ensuing quarter, and the orders issued on October 1, 1941, also recited that they were in payment for the month of October, thus evidencing defendant's knowledge and understanding of the different terms set forth in the respective orders. It would not be a reasonable inference therefrom that the parties

Wadsworth v. Duff or Gardner, 201 Ill. 626, 1Ad S.C. in Smith & Co. v. Stuart, 116 Ill. App. 2181 Barnes v. The Waters of Blue, 46 Ill. App. 361; Lingwall v. Gaines, 116 Ill. App. Duff; Hamilton v. Avery, 147 Ill. App. 127.

The stipulations that went for the period of a quarter of a century extending from July 1, 1912, to and including July 1, 1937, the quarterly orders were regularly issued for other reasons besides to provide publicity, as all of which orders by the assignees "that such orders were in payment of such claims rendered for the general protection and rate of said assets." Lengthy could not, or otherwise in accordance for getting from the fiduciary taken out understanding of the partial, and in another word the activity that was intended to the county officials from their own results. All ex-cluded as evidence by objecting of counsel, as issues of the County Clerk and duly constituted by the County Treasurer who gave the same to the notices publicity constituting and of the county in the county treasury expenditure for the result of the claim. It is not proved that the notices and claims were not mailed and the entire course that the notice was to order. But that it appear from the state of the record as to this it that may should be made of the period. The number of days of the first orders delivered to the Treasurer publicity in the first day of the quarter publication was after certification on the commission until after 1911 is not shown. It is significant, however, that in six instances the orders issued by the commission during prior to July 1, 1912, consistently appear in language contrary to that of all subsequent orders that they were payment in notices for the quarter ended, and the order issued on October 1, 1911, the notices such they were in payment for the month of October, thus strongly corroborate's testimony and conter-structure of the different terms are facts in the notice the orders. It would not be a reasonable interpretation contrary that the notice

who issued such orders over a long intervening period of years did not recite the facts nor understand the plain and unambiguous language of the orders so drawn by them, so understood and received by the plaintiffs and now in question.

The issuance of the orders containing recitals of the purpose, amount and nature of the payments, when so received and collected by the plaintiffs, constituted acceptance and receipt of the warrants for moneys due them on terms therein set forth. The prima facie evidence of the facts recited in such receipted orders must be overcome by a clear preponderance of the evidence. Ennis vs. Pullman Palace Car Co., 165 Ill. 161, 46 N.E. 439; People vs. Davis, 269 Ill. 256, 273, 110 N.E. 9.

The burden of impeaching a receipt is upon the party who gave it. Long vs. Long, 132 Ill. App. 409; McElhany vs. People, 1 Ill. App. 550; House vs. Beak, 43 Ill. App. 615, 617; McGovern vs. City of Chicago, 202 Ill. App. 139. The same rule applies herein.

In Winchester vs. Grosvenor, 44 Ill. 425, 426, it was held that a written receipt may be explained by parol, "but the proof by which it is done must be clear and unmistakable. A written receipt is evidence of the highest and most satisfactory character, and to do away with its force, the testimony should be convincing, and not resting in mere impressions, and the burden of proof rests on the party attempting the explanation." This rule was again approved by the Supreme Court in Ennis vs. Pullman Palace Car Co., supra, wherein, at page 182, the Supreme Court used this language "It is true that a written receipt may be explained by parol; but it is prima facie evidence of the facts recited in it; and, the evidence furnished by it being of the highest and most satisfactory character, its force can only be impaired by testimony which is convincing. The proof, offered to explain it, must be clear and unmistakable. It must be overcome, if overcome at all, by a clear preponderance of the evidence. (Winchester v. Grosvenor, 44 Ill. 425; Rosenmueller v. Lampe, supra; Neal v. Handley, 116 Ill. 418)."

was learned some months after a long period of injury did not result in the facts nor demonstrate the claim the commissioner imagined or the evidence so strong of injury, so unexpected was produced by the plaintiff's old case in question.

The instance of the orders controlling evidence of the subject, issued and before of the commission, there is required and allowed by the plaintiff's contributed commissioner and reason of the authority for damage due been or other courts not facts. The prima facie evidence of the facts produced in some commission order must be overcome by a clear preponderance of the evidence.

Smith vs. Pullman Palace Car Co., 126 Ill. App. 48 S.C., 200; Pennsylvania vs. Davis, 187 Ill. 324, 272, 1.c. 2.

The burden of introducing a remedy is upon the party who gave it. Lang vs. Long, 136 Ill. App. 4; Kelly vs. Kelly, 2 Ill. App. 280; Moses vs. Bank, 17 Ill. App. 240, 247; Wolfers vs. City of Lincoln, 102 Ill. App. 136. The rule rule applies herein.

In Lockwood vs. Sherman, 44 Ill. App. 4, 6, it was said that a written remedy may be substituted by proof. "But the proof by which it is done must be clear and satisfactory. A written remedy is evidence of the claimed for many satisfactory conditions, and it is not that the facts, but testimony should be conclusive, and a rule relied in such instances, and for matter of proof rests on the party attempting the substitution." This rule was again followed by the Appellate Court in Illinois vs. Pullman Palace Car Co., supra, decided at page 128 the Appellate Court said this language "It is true that a written remedy may be substituted by proof; but it is of the Public Statute evidence of the facts produced in it; and, the evidence furnished by it should be the strongest and most satisfactory character, the force can only be overcome by evidence which is convincing. The proof, offered to substitute it, must be clear and satisfactory. It must be strong, if it overcome it all. By a clear preponderance of the evidence. Illinois vs. Chicago, 24 Ill. App. 1; Lockwood vs. Sherman, supra; Lang v. Lang, 136 Ill.

If other records than the orders themselves tended to prove payment for different periods or quarters than those specifically designated in all of the orders, such records, if any existed, were in the possession and control of the defendant upon whom it devolved as a matter of affirmative defense to produce such proof in order to overcome the clear and unambiguous recitals of fact appearing on the face of the county warrants and receipted orders.

A mistake of law, if any, as to whether the blind relief benefits "payable quarterly" under the former statutory provisions and "payable monthly" under the Act as amended, became so payable in advance or payable at the end of each quarter or month in question need not be decided herein, as a mistake of law, if any, could not be corrected or availed of as a defense in this proceeding. We also hold that a mistake of fact, to be availed of as a defense, when so pleaded, must affirmatively appear and be proven by a preponderance of the evidence. (Citations, supra.) Whether the quarterly payments in question were actually made at the end of each quarter as expressly recited on the face of the various orders or were actually paid in advance contrary to the language of such recitals, became a question of fact under the pleadings and evidence herein.

We find and hold that it appears from the manifest weight of the evidence that the plaintiffs did not receive payment in advance of the blind pension benefits due and owing to each of them for the 92 day period comprising the months of July, August and September, 1941, and that the orders issued on July 1, 1941, in the sum of $91 covered benefits due and so paid by the defendant for the 91 days of the months of April, May and June of the preceding quarter ending on June 30, 1941, as therein specifically recited and set forth. We further hold that in finding the issues and entering judgment in bar of suit and for costs in favor of the defendant and against the plaintiffs, the Trial Court acted contrary to the manifest weight of the evidence and that reversible error appears in the record. The judgment of the Circuit Court of Shelby County is therefore reversed and the cause is remanded for further proceedings in accordance with the holdings herein.

REVERSED AND REMANDED.

If other records also order necessitate lessons to prove payment for different periods or quarterly than their quarterly deficiency is all of the amount, such records, if authentic, were in the possession and control of the defendant, and the failure as a matter of affirmative defense to produce such record is prima facie evidence that such disbursements exceeded if from appropriated to the time of his county treasurer and preceding years.

A witness of law, if any, is to produce the claim relied upon "periods quarterly" under the latter statutory provisions and "periods monthly" under the act as amended, because as primary in advance or periods at the end of each quarter or month in question that he is entitled herein, as a matter of law, if any, would not be interpreted or relied of as a defense in this proceeding. He also said that a matter of fact, to be treated of as a defense, must be pleaded, and affirmatively support and be proven by a preponderance of the evidence. (Citations omitted.) Failure to quarterly statements in question were actually made at the end of each month or quarterly period on the part of the federal orders or sole liability and in absence contrary in the judgment of such courts, because a question of fact under the pleadings and evidence herein.

We find no also that is appears that the evidence weight of the evidence that the plaintiff's and her testimony reason in no-where of the third counties benefits the and acting, to some of time for the 20 day period requisite for notice or 1967, August and September, 1971, and last the notice issued on July 2, 1971. In the sum of $71 [illegible] benefits and is paid to the defendant for the 21 days of the months of April, May and June of the year-ending quarter ending on June 30, 1971, in quarterly-monthly treated and not fixed. The further said lack to finding the issues and material judgment in her of said and for cause in favor of the defendant and against her plaintiff, the trial Court held monetary to the monthly rights of the evidence and such reasonable error appears in the record. The judgment of the Circuit Court or county County is therefore reversed and remanded for further proceedings in accordance with the opinion herein.

the cause is

Reversed and remanded.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1943.

General No. 9364 Agenda No. 9

EDWARD W. BROWN, a Minor, by CHARLES BROWN, His Next Friend, DAISY BYBEE and WILLIS BYBEE, Plaintiffs-Appellees, -vs- ROBERT H. STEED and WILLIAM McCANN, Partners, Doing Business as the STATE GROCERY & MARKET, and MELVIN APELL, Defendants-Appellants.	Appeal from Circuit Court McLean County.

DADY, J:

This is an automobile collision case.

Daisy Bybee and Willis Bybee, her husband, brought suit in the circuit court against Robert H. Steed and William McCann, co-partners doing business under a trade name, and against Melvin Apell, as the driver of the co-partners' delivery truck. The co-partners filed a counter-claim against Mr. and Mrs. Bybee.

The jury returned a verdict against all defendants, in favor of Mrs. Bybee in the sum of $175, and in favor of Mr. Bybee in the sum of $330, and returned a verdict of not guilty on the counter-claim.

The circuit court entered judgment on the verdicts in favor of Mr. and Mrs. Bybee respectively, as plaintiffs and counter-defendants.

All three defendants bring this appeal.

Edward W. Brown was a co-plaintiff, but is not connected with this appeal.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1942.

General No. 9964 Agenda No. 9

EDWARD W. BROWN, a Minor, by
CHARLES BROWN, His Next-Friend,
DAISY BYRNES and WILLIS BYRNES,

Plaintiffs-appellees,

-vs-

ROBERT H. BYRNES and WILLIAM
McCANN, Partners, Doing Business
as the STATE GROCERY & MARKET,
and MELVIN ASELL,

Defendants-Appellants.

Appeal from
Circuit Court
McLean County.

DADY, J.:

This is an automobile collision case.

Daisy Byrnes and Willis Byrnes, her husband, brought suit in the circuit court against Robert H. Byrnes and William McCann, co-partners doing business under a trade name, and against Melvin Asell, as the driver of the co-partners' delivery truck. The co-partners filed a counter-claim against Mr. and Mrs. Byrnes.

The jury returned a verdict against all defendants, in favor of Mrs. Byrnes in the sum of $175, and in favor of Mr. Byrnes in the sum of $200, and returned a verdict of not guilty on the counter-claim.

The circuit court entered judgment on the verdicts in favor of Mr. and Mrs. Byrnes respectively, as plaintiffs and counter-defendants.

All three defendants bring this appeal.

Edward W. Brown was a co-plaintiff, but is not connected with this appeal.

No question of the sufficiency of the pleadings is involved.

The collision occured about the noon hour on August 23, 1941, in the southwest quarter of the intersection of Colton Avenue and Jefferson Street in the City of Bloomington. Both streets were paved. The paved portion of Colton Avenue was 40 feet in width. The record does not show but we will assume Jefferson Street was of about the same width. The record does not show there were any stop signs or traffic signals. Mrs. Bybee, accompanied only by Edward W. Brown, a four year old child, was driving a Chevrolet automobile southerly on Colton Avenue. Apell was driving the delivery truck easterly on Jefferson Street. The front end of the truck ran into the right hand side of the automobile "between the rear wheel and the door." The foregoing facts are undisputed.

The first contention of defendants is that plaintiffs were guilty of contributory negligence.

The only witnesses who testified as to what occurred at and just prior to the time of the collision were Mrs. Bybee, a disinterested witness named Lott who testified for plaintiffs, and Apell.

Mrs. Bybee testified she had been driving a car at least 15 years; that in approaching Jefferson Street she was driving about 15 miles per hour, and when about 15 feet from Jefferson Street she slowed up and looked both ways, but saw no one approaching on Jefferson Street and then proceeded into the intersection.

Lott testified he was driving south on Colton Avenue about 100 or 150 feet behind the Bybee car; that the Bybee car was going about 20 or 25 miles per hour; that as the Bybee car

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Lott testified he was driving south on Colton Avenue about 100 or 150 feet behind the Bybee car; that the Bybee car was going about 20 or 25 miles per hour; that as the Bybee car

was going through the intersection he first saw the truck when the truck was about 150 feet west of the point of the collision, and he saw the truck strike the Bybee car; that in his opinion the truck was going between 45 and 50 miles per hour and did not slow down before the collision.

Apell testified that he was going about 25 miles an hour; that when about ten or fifteen feet from the intersection he looked first to his left but did not see the Bybee car; that he then looked to the right, and "I didn't see her car until I actually hit it. * * * I couldn't say how fast she was going. * * * I guess I was about five or ten feet from the Bybee car when I first noticed it. The Bybee car was practically out of the intersection and my car was entering the intersection at that time." ~~He also testified that his speed was about 25 miles per hour.~~

Defendants cite Section 68 of the Motor Vehicles Act (Par. 165, Ch. 95½, Ill. Rev. Stats. 1941,) which provides that "motor vehicles travelling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the RIGHT ~~left~~", and contend that the evidence shows such a clear violation by Daisy Bybee of such statutory provision as to amount to contributory negligence as a matter of law. Generally the question of contributory negligence is one of fact for the jury, taking into consideration all the facts and circumstances shown by the evidence. (Foreman Bank v. Chicago Rapid Transit Co., 252 Ill. App. 151 and Glassman v. Keller, 291 Ill. App. 262.) The question of contributory negligence becomes a question of law only when it can be said that all reasonable minds would reach the conclusion under the facts stated that such facts did not establish due care and caution on part of the person charged with contributory

was going through the intersection he first saw the truck when the truck was about 150 feet east of the point of the collision, and he saw the truck strike the Dybee car; that in his opinion the truck was going between 45 and 50 miles per hour and did not slow down before the collision.

Agell testified that he was going about 35 miles an hour; that when about ten or fifteen feet from the intersection he looked first to his left but did not see the Dybee car; that he then looked to the right, and "I didn't see her car until I actually hit it. * * * I couldn't say how fast she was going. * * * I guess I was about five or ten feet from the Dybee car when I first noticed it. The Dybee car was practically out of the intersection and my car was entering the intersection at that time." ~~He also testified that his speed was about 15 miles per hour.~~

Defendants cite Section 22 of the Motor Vehicles Act (Par. 165, Ch. 95½, Ill. Rev. Stats. 1941,) which provides that "motor vehicles travelling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right", and contend that the evidence shows such a clear violation by Daisy Dybee of such statutory provision as to amount to contributory negligence as a matter of law. Generally the question of contributory negligence is one of fact for the jury, taking into consideration all the facts and circumstances shown by the evidence. (Forman Bank v. Chicago Rapid Transit Co., 252 Ill. App. 161 and Glassman v. Keller, 321 Ill. App. 206.) The question of contributory negligence becomes a question of law only when it can be said that all reasonable minds would reach the conclusion under the facts stated that such facts did not establish due care and caution on part of the person charged with contributory

negligence. (Thomas v. Buchanan, 357 Ill. 270.) The mere fact that the contributory negligence charged against Daisy Bybee arose from an alleged violation of a statute does not take the case out of the operation of the foregoing rules. The duty to yield the right-of-way under Section 68 to vehicles approaching from the right is not an absolute duty but depends upon the facts and circumstances of each particular case. This principle is made clear in Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89, in which the court says at page 94: "It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Whether, in exercising his judgment and going ahead, the driver exercised due care, is, we repeat, ordinarily a question for the jury to decide."

We are of the opinion that there was ample evidence to justify the jury in finding that the plaintiff Daisy Bybee was in the exercise of due care at and immediately prior to the time of the accident. Where there is such evidence we are obliged to sustain the finding of the jury on this issue. (Dee v. City of Peru, 343 Ill. 36.)

negligence: (Thomas v. Buchman, 37 Ill. 470.) The mere fact that the contributory negligence charged against Daisy Dybee arose from an alleged violation of a statute does not take the case out of the operation of the foregoing rules. The duty to yield the right-of-way under section 88 to vehicles approaching from the right is not an absolute duty but depends upon the facts and circumstances of each particular case. This principle is made clear in Heidler Co. v. Wilson & Bennett Co., 242 Ill. App. 89, in which the court says at page 94: "It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Whether, in exercising his judgment and going ahead, the driver exercised due care, is, we repeat, ordinarily a question for the jury to decide."

We are of the opinion that there was ample evidence to justify the jury in finding that the plaintiff Daisy Dybee was in the exercise of due care at and immediately prior to the time of the accident. Where there is such evidence we are obliged to sustain the finding of the jury on this issue. (Dee v. City of Peru, 242 Ill. 56.)

Defendants next contend that plaintiffs' instruction number 4 was erroneous in referring the jury to the complaint to determine the issues, there being no instruction which told the jury what the issues were. The instruction was objectionable in this respect, but we do not think such error would justify a reversal of this particular case. (See Waschow v. Kelly Coal Co., 245 Ill. 516.) Moreover the defendants are in no position to urge such error for the reason that one of their instructions told the jury "that the burden of proof * * * is upon the plaintiffs to prove by a preponderance of the evidence that the defendant was guilty of one of more of the specific acts of negligence charged," which, of course, likewise necessarily referred the jury to the complaint to determine what acts of negligence were in fact charged.

Plaintiffs' instruction number 5 told the jury that if they found for the plaintiffs then Willis Bybee was entitled to the cost of the necessary repairs to his automobile. It is urged that the instruction erroneously further stated that he was entitled to the value of his automobile while he was necessarily deprived of such use, and to the loss of services and companionship of his wife, etc, there being no evidence of the value of such use or of the value of the services of the wife. We believe this contention is frivolous for the reason that the undisputed evidence shows that the cost of the repairs to the automobile was $329.15, and Willis Bybee also paid a hospital bill of $3.00 and a doctor bill of $12.00, made necessary because of the injuries to his wife, while the verdict allowed Willis Bybee only the sum of $330.

Plaintiffs' instruction number 6 is also complained of for the reason that it referred to the complaint. What we have said as to instruction number 4 disposes of this objection. This

Defendants next contend that plaintiff's instruction number 4 was erroneous in referring the jury to the complaint to determine the issues, there being no instruction which told the jury what the issues were. The instruction was objectionable in this respect, but we do not think such error would justify a reversal of this particular case. (See Hagerman v. Kelly Coal Co., 245 Ill. 316.) Moreover the defendants are in no position to urge such error for the reason that one of their instructions told the jury "that the burden of proof * * * is upon the plaintiffs to prove by a preponderance of the evidence that the defendant was guilty of one or more of the specific acts of negligence charged," which, of course, likewise necessarily referred the jury to the complaint to determine what acts of negligence were in fact charged.

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instruction is also objected to on the ground that it stated that if the jury should find for the plaintiffs then, to enable the jury to estimate the amount of the plaintiffs' damages, it was not necessary that any witness should have expressed an opinion as to the amount of damages, but the jury might make such estimate from the facts and circumstances in proof relating to the subject of the extent of plaintiffs' damages. This instruction, practically verbatim, was approved in Richardson v. Nelson, 221 Ill. 254, 258.

The only other complaint of the defendants is as to plaintiffs' instruction number 7, which, in form, is the instruction usually given with reference to the damages allowable to a plaintiff for personal injuries. However, it is complained that the instruction also erroneously told the jury that in assessing the damages of Mrs. Bybee they should take into consideration to what extent she had been injured or marred in her personal appearance, if any, and among other things told the jury that they could allow her a fair compensation for her damages to the extent to which she had been injured or marred in her personal appearance, if any. It is also contended in this connection that the court erroneously refused an instruction tendered by the defendants, which stated that in determining the damages of Mrs. Bybee the jury had no right to take into consideration her mental suffering, if any, resulting from embarrassment or humiliation because of any disfigurement or marring of her appearance.

The giving and refusal of such instructions was error. (See Chicago City Ry. Co. v. Anderson, 182 Ill. 298; Cullen v. Higgins, 216 Ill. 78; C. B. & Q. R.R.Co. v. Hines, 45 Ill.App. 299; C. & G. T. Ry. Co. Spurney, 69 Ill.App. 549; West Chicago St. R.R.Co. v. James, 69 Ill.App. 609; City of Decatur v. Hamilton, 89 Ill.App. 561; Chicago City Ry.Co. v. Mauger, 105 Ill.App. 579.)

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The giving and refusal of such instructions was error. (See Chicago City Ry. Co. v. Anderson, 168 Ill. 588; Quinlan v. Bigelow, 216 Ill. 72; C. B. & Q. R.R.Co. v. Hines, 45 Ill.App. 289; C. & O. T. Ry. Co. Spurrier, 69 Ill.App. 340; West Chicago St. R.R.Co. v. Jones, 69 Ill.App. 608; City of Decatur v. Hamilton, 88 Ill.App. 401; Chicago City Ry.Co. v. Mauger, 105 Ill.App. 379.)

Were the verdicts in this case excessive or apparently excessive we would be inclined to reverse the case because of the error in the giving and refusal of such instructions. However, in this particular case we do not consider that such error justifies a reversal. Prior to the accident Mrs. Bybee was in good health and did her own housework. She testified that as a result of the accident she was cut on the head quite a bit, her right arm was hurting her quite a bit, and she had bruises on her body and legs, that she was in pain and stayed that way for six or seven weeks, during which time she was unable to do her housework; that two scars on her face fester up once in a while and little pieces of glass come out of them; and that at the time of the trial she could hardly lift her right arm. Her attending physician testified she had a laceration on her forehead which he sutured, and there were many small abrasions on her face and hands; that the muscles of her right shoulder were strained; that she was in pain and very nervous after the accident. The jury allowed her only $175. We do not consider this excessive, and in fact defendants make no claim that it is excessive. Under these circumstances we consider it would be unjust to reverse this case because of such error. (See C. & E.I. R.R. Co. v. Kneirim, 152 Ill. 458; Bacon v. Emerson-Brantingham Co., 213 Ill.App. 96; Weyer v. Staggs, 264 Ill.App.556.)

There being no reversible error the judgment of the circuit court is affirmed.

Affirmed.

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There being no reversible error the judgment of the circuit court is affirmed.

AFFIRMED.

General number 9358. Agenda number 5.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A. D. 1943.

H. C. WILLADSEN, doing business as H. C. Willadsen Construction Co.,	APPEAL FROM THE CIRCUIT COURT OF TAZEWELL COUNTY.
Plaintiff-Appellee,	
-vs-	
CITY OF EAST PEORIA, ILLINOIS, a Municipal Corporation,	~~HONORABLE HENRY J. INGRAM, Judge presiding.~~
Defendant-Appellant.	

HAYES, J.:

H. C. Willadsen, plaintiff herein, recovered a summary judgment in the sum of $14,320.16 against the defendant, the City of East Peoria, Illinois, a Municipal Corporation, for work done in the construction of a sewer system within said city.

The complaint alleges that the City of East Peoria undertook to build a system of sewers within the city. When the work had been partially completed, the original contractor defaulted, and the city then entered into a new contract with the plaintiff herein for the completion of the sewer system. After the plaintiff had performed $166,281.53 worth of work and had been paid $152,873.82 to apply thereon, the City ran out of funds, and gave notice to the contractor to cease work until funds would be available to the city. The contractor elected to cancel the contract and brought suit for the ten percent that was retained by the city under the terms of the contract until the completion of the work. The defendant, by its answer and amendment thereto, admitted the contract;

Federal Counsel cont. Court Docket 2.

IN THE CIRCUIT COURT

OF ILLINOIS

COOK DISTRICT

Federal Case, C. C. Docket.

U. S. Statutes, Duke Corporation Case
case of J. S. Hillman
Contempt of Court.

Plaintiff-Appellee,

-vs-

City of East Chicago, Illinois,
a municipal corporation,

Defendant-Appellant.

MOTION.

M. G. Hillman, plaintiff herein, recovered a money judgment in the sum of $18,000.00 against the defendant, the City of East Chicago, Illinois, a municipal corporation, for work done in the construction of a sewer system within said city.

The defendant admits that the City of East Chicago undertook to build a system of sewers within the city. That the work had been partially completed, the original contractor abandoned, and the city then entered into a new contract with the plaintiff herein for the completion of the sewer system. After the plaintiff had performed $18,[illegible] worth of work he had been paid $10,[illegible] on a monthly basis, the city then got in doubt, and gave notice to the contractor to cease work until such doubt is resolved to the city. The contractor claimed in court the contract had complied with the law in terms that was required in the city under the terms of the contract until the completion of the work. The judgment by the court and conclusion thereon, obtained the contract;

admitted that it caused the work to stop on account of lack of funds; admitted the amount of work done, and admitted the balance due to be correct as set up in the complaint, but denied the contractor's right to cancel the contract and insisted that he should be compelled to complete the contract at some future date, when the city would have available funds.

The plaintiff filed a motion for summary judgment for the sum of $13,407.71, with interest and costs, and in support thereof filed an affidavit which sets out the contract, the records and accounts showing the construction of the completed sewer lines, the cessation of the work by reason of the City's exhaustion of funds, the total amount due, the amounts paid, and a letter from the City ordering the work to cease for lack of funds. The affidavit further stated that all the facts contained in said affidavit are within the personal knowledge of the plaintiff, and if he is sworn as a witness he can testify competently thereto. Attached to the affidavit is a copy of the contract, itemized statements of accounts covering the sewer construction and copies of correspondence between the plaintiff and the City.

To plaintiff's motion for summary judgment, defendant filed a cross-affidavit which alleged that plaintiff agreed and undertook to fully perform said contract, and that plaintiff had failed and was therefore not entitled to recover. Plaintiff filed a motion to strike the answer and cross-affidavit, and then defendant filed an amendment to the answer, which admitted plaintiff was entitled to the judgment in the amount claimed, without interest, provided that the entry thereof in no way amounted to a cancellation.

The Court allowed the motion for a summary judgment and gave a judgment in favor of the plaintiff and against the

adding that it behoves the court to deny an injunction at least in order; adding the amount of mere fraud, and stating the facts that to be correct it was in the jurisdiction, not lawful in authorities right to accept the contract and insisting that he should be compelled to complete the performance of some items, when the city could have available them.

The plaintiff filed a motion for summary judgment for the sum of $13,[illegible]07.72, with interest and costs, and in support thereof filed an affidavit which sets out the contract, the records and accounts showing the performance of the unpaid balance items, the execution of the work by reason of the city's acceptance of them, the written demand for payment, and a letter from the city attorney the work to cease for lack of funds. The affidavit further states that all the items contained in said affidavit are within the personal knowledge of the plaintiff, and it is in every of a witness he has ability competently testify. Included in the affidavit is a copy of the contract, detailed statements of accounts showing the amount outstanding and copies of correspondence between the plaintiff and the city.

The plaintiff's motion for summary judgment, therefore filed a cross-affidavit which alleges that plaintiff agreed and undertook to fully perform, said contract, and that plaintiff has fulfilled and has therefore not violated in reporter. Plaintiff filed a motion to strike the answer and cross-affidavit, and that defendant filed an amendment to the answer, which amended plaintiff was entitled to his judgment in the amount claimed, without interest, because the entire amount is no way connected to a counterclaim.

The court allowed the motion for a summary judgment and gave a judgment in favor of the plaintiff and against the

defendant in the sum of $14,320.16 and costs.

Where a contractor bids on a unit price based on the existing prices for labor and material, and through no fault of his the other party orders the work stopped on account of running out of funds, the contractor is not required to speculate on what the price for labor and material might be at the time the work might be ordered resumed by the other party. Under these circumstances the law gives a contractor the right to cancel a contract and sue and recover for the work then completed. Pauly, et al., v. County of Madison, 211 Ill. App. 13; Dobbins, et al., v. Higgins, et al., 78 Ill. 440; City of Chicago v. Tilley, 103 U.S. 146; 26 Law Ed. 371.

Plaintiff's motion for summary judgment and affidavit in support thereof is in accord with Supreme Court rule 15, chapter 110, section 259, Ill. Rev. Stats, 1941. The affidavit of the defendant fails to show a good defense, and fails to show with particularity any facts upon which the defense is based but merely consists of a conclusion of the affiant, "that the plaintiff had failed to perform said contract and is therefore not entitled to recover any sum." Likewise the answer of the defendant as amended, confesses the cause of action set up by the plaintiff in his complaint but requests that the contract shall not be cancelled. The action on the original complaint is one at law. The defendant did not pray for any relief in equity in the pleadings and under these circumstances the court is warranted in entering this judgment, for there is no issue made on any fact or facts by the pleadings. There is no issue of fact made for a Jury or Court to try and nothing for the court to do other than enter judgment on the pleadings as provided under rule 15, supra. Wainscott v. Fenikoff, 287 Ill. App. 78; Roberts v. Sauerman Brothers,

determined in the area of Ind.Code 1-1 and article.

There is nothing also on a well-settled point of the existing rights for lawful and authorized, and therefore in fault on the other party where the area exceeds an amount of running out of tracks, the quantity is not material to consider as that the price for labor and actually right as the time for each which is rendered by the other party. Under these circumstances the 1-7 gives a contractor the right to cancel a contract and sue and recover for the work done completed. Tenny, et al., v. County of Jackson, 21 Ind. App. 120; Sobers, et al., v. Mahoney, et al., 28 Ind. App. 177; Ind. Code v. Pilney, 120 U.S. 140; 30 Law ed. 577.

Plaintiff's action for damages, judgment and attorney's in support thereof is in accord with Supreme Court rule 12, chapter 112, section 1-1, 1-2. Ind. Code, 1941. The activity of the defendant Fritz is more a true defense, and "fail to show with particularity any facts upon which the defense is based but merely allegation of a conclusion of the action." Does the plaintiff had failed to perform his contract and in therefore not entitled to recover for work. Likewise the answer of the defendant or counsel, a defense the issue or action set up by the plaintiff in his complaint but requires only the contract that is not as consented. The action on the original proceeding is the at law. The defendants did not show for any relief in writing in the pleadings and answer these alternatives. The court is authorized in entering this judgment. For there is no issue made to any fact or right by the pleadings. There is no issue of fact made and a jury or jurors or jury and making for the court to be other than with judgment on the pleadings as provided under rule 12, supra. Pleadings [illegible] 1-7, 1-2, 1-3. See Jones v. Bowman [illegible],

Inc., 300 Ill. App. 213.

The defendant in its brief suggests that the City will be embarrassed in another pending lawsuit that it has with the original contractor by the judgment entered in this case, for it will be claimed in that case that the damages will be limited to the judgment entered herein, and further that the City will not be able to complete its sewer system unless it makes full recovery from the original contractor. This argument is not based on the record in the present case, and is not a valid ground to deny the plaintiff of the rights the law gives him.

The cases cited by the defendant on the proposition that the court should not have entered the summary judgment are all cases where the affidavit of defense properly set up facts showing a good defense and are not applicable to the situation shown in this record.

Defendant contends that the Circuit Court erred in allowing plaintiff interest at five percent and points out that there is no express provision in the contract for interest, but it appears from the pleadings herein that there was due the plaintiff the sum of $13,407.71 at the time the City ordered the work stopped. The City admitted this by its amended answer. Section 2, chapter 74 of the Interest Act provides, "creditors shall be allowed to receive at the rate of five (5) per centum per annum * * * on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance." The general rule as to the liability of municipalities is that they are not liable on contracts for interest, in the absence of an express contract to pay it, yet where it is unlawfully and wrongfully withheld a municipality is liable for interest to the same extent as a private person. Conway v. City of Chicago,

Ind., 200, App. 612.

The statements in its notice suggests that one line will be substituted in another product instead that it has also the implied contention of the judgment entered in this case, for it will be allowed to their eyes when the damages will be limited to the judgment entered herein, and further that the city will not be able to receive its water system unless it makes full recovery from the original contractor. This argument is not based on the record in the present case, and is not a valid ground to deny the plaintiff of the rights the law gives him.

The cases cited by the defendant on the proposition that the court should not give effect to a mandatory judgment are all cases where the attitude of defendants arbitrarily had no basis showing a good reason and were not applicable to the situation shown in this record.

Defendant contends that as the Illinois Court erred in allowing plaintiff interest in five months and nothing and that there is no express provision in the contract for interest, but it appears from the plaintiff's brief that there was due the plaintiff the sum of $13,407.77 in the time the city ordered the work stopped. The city admitted this by its counsel answer. Section 6, chapter 74 of the Illinois set statutes, "contracts shall be allowed to accrue at the rate of five (5) per centum per annum * * * on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance." The plaintiff file as to the liability of contractor in this suit are not liable on contracts for interest, in the absence of an express contract to pay it, yet there is no doubt and arbitrarily withholding a municipality is liable for interest in the same manner as a private person. Cooney v. City of Chicago,

237 Ill. 128; Cook v. City of Staunton, 295 Ill. App. 111.

We are of the opinion that the Circuit Court properly entered the summary judgment including interest and therefore the judgment of the Circuit Court of Tazewell County is affirmed.

JUDGMENT AFFIRMED.

40482

ELIZABETH McMANIMEN,

Appellee,

v.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation,

Appellant,

and

SEARS, ROEBUCK AND COMPANY, a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

317 Ill. App. 43

Abstr. 4-15-43

43

328

317 I.A. 649

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The verdicts found the Public Service Company guilty, assessing damages at $8,200.00 and Sears, Roebuck and Company not guilty. The Service Company's motions for a directed verdict at the close of the plaintiff's case and for judgment notwithstanding the verdict were denied, and judgment was entered on the verdict.

The Service Company has appealed and contends that its motions should have been granted; that the verdict is against the manifest weight of the evidence; that the damages are excessive and that the court ruled erroneously on certain evidence and instructions.

On January 27, 1937, at about 1:30 P. M., Employee Bowen of Sears, Roebuck and Company, accompanied by a customer, pulled a light switch to illuminate the service room at the rear of Sears' store and building, located on the south side of Illinois street in Chicago Heights, Illinois. A bluish flame immediately appeared about the socket of the light, filled the room, and an explosion followed, which blew the service room doors off, separated walls from the roof, greatly damaged the rear inside of the building and broke plate glass windows in both floors at the front. Plaintiff,

ELIZABETH MARKHAM,

Appellee,

v.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation,

Appellant,

and

SAME, DOING BUSINESS AS DOWNEY, a corporation,

Appellee.

Appeal from Municipal Court of Chicago.

Honorable Edward Scanlan, Judge.

Abstract of Record.

40. JURISDICTION ONLY INVOLVED THE VERDICT IS TOO SMALL.

This is a personal injury action. The verdicts found the Public Service Company guilty, assessing damages at $8,000.00 and Same, Doing and Company not guilty. The Service Company's motions for a directed verdict at the close of the plaintiff's case and for judgment notwithstanding the verdict were denied, and judgment was entered on the verdict.

The Service Company has appealed and contends that its motions should have been granted; that the verdict is against the manifest weight of the evidence; that the damages are excessive and that the court ruled erroneously on certain evidence and instructions.

On January 27, 1927, at about 1:30 P. M., Emelyne Jones of Same, Doing and Company, accompanied by a customer, called a light switch to illuminate the service room at the rear of Same's store and building, located on the south side of Illinois street in Chicago Heights, Illinois. A bluish flame immediately appeared above the socket of the light, filled the room, and an explosion followed, which blew the service room doors off, separated walls from the roof, greatly damaged the rear inside of the building and broke plate glass windows in both floors at the front. Plaintiff,

her hand on the door at the front of Sears' Store was about to enter and make a purchase when the explosion occurred and she was thrown several feet upon the sidewalk. She landed on her face and head and, while lying there, was struck by an upholstered chair thrown from the display window and, as she rose to her hands and knees, was showered by plate glass fragments from the broken windows. She was helped to her feet and into a nearby store where she sat for a few minutes and, suddenly recalling that she must pay her gas bill that day in order to gain the discount, hurried alone to the Public Service Office two blocks west of, and on the same side of Illinois street as, Sears' Store. She paid the bill, walked east to the first street west of Sears' Store, where she crossed to the other side of the street through heavy traffic, resumed her journey east to the first street east of Sears store where she re-crossed the street through heavy traffic and resumed her eastward course to the next block where he son awaited her in an automobile. She entered the automobile herself, was driven to her home where she entered alone and a Dr. Hay was called and discovered numerous little scalp cuts, some face abrasions, a number of bumps on the right side of her head, one large bump, signs of concussion, her right hip swollen and the skin removed where the chair had struck her; found a tenderness in the sacro-lumbar region of the right side and the patient very nervous. He attended her daily for 9 days and then treated her off and on until June.

From the time of her injury in January until August 9, 1937, plaintiff never left her home alone and, while taken occasionally for a ride, was always accompanied. She and her husband conducted a boarding house, in which plaintiff before her accident did the housework and managing. Following the accident she no longer was able to do the work and employed a woman for that purpose.

her hand on the door of the front of Berry' store was about to enter and make a purchase when the explosion occurred and she was thrown several feet from the sidewalk. She landed on her face and hand but, while lying there, was struck by an upholstered chair thrown from the display window and, as she rose to her knees and hands, was showered by glass fragments from the broken window. She was helped to her feet and into a nearby store where she sat for a few minutes and, suddenly remembering that she must pay her gas bill that day in order to gain the discount, hurried alone to the Public Service Office two blocks west of, and on the same side of Illinois street as, Berry' store. She paid the bill, walked west to the first street west of Berry' store, where she crossed to the other side of the street through heavy traffic, resumed her journey west to the first street west of Berry store where she re-crossed the street through heavy traffic and resumed her westward course to the next block where he son awaited her in an automobile. She entered the automobile herself, was driven to her home where she entered alone and a Dr. Guy was called and discovered numerous little scalp cuts, some face abrasions, a number of bruise on the right side of her head, one large bump, signs of concussion, her right hip swollen and the skin removed where the chair had struck her; found a tenderness in the sacro-lumbar region of the right side and the patient very nervous. He attended her daily for 8 days and then treated her off and on until June.

From the time of her injury in January until August 2, 1940, plaintiff never left her home alone and, while taking occasionally for a ride, was always accompanied. She had her insured implanted a hearing horn, in which plaintiff listens for accidents did the housework and cooking. Following the accident she no longer was able to do the work and employed a woman for that purpose.

On August 9, 1937, plaintiff left her home alone and walked several blocks to the business district of Chicago Heights, and when about to enter a store, slowly sank to her knees, lost consciousness and was taken to a hospital where Dr. Blim attended her and found her unconscious, suffering from a stroke with paralysis beginning to appear. She remained in the hospital a few days and was then brought home and confined to her bed for ten or twelve days. In December 1937, Dr. May again saw her and she was still suffering from slight paralysis of the right arm and leg, and at the time of the trial her right arm was greatly diminished in function and strength and a dragging gait of the right leg, which followed the accident, had improved to a limp.

The defendant first contends that the trial court erred in not sustaining its motion for a directed verdict and for judgment notwithstanding the verdict, claiming that there is no evidence tending to support the specific allegations of the complaint. Plaintiff alleges that the defendant had the duty of maintaining its system so that gas would not escape and endanger human life and that it did not observe its duty, but negligently permitted its gas main at the rear of Sears' Store to become defective, as a result of which the illuminating gas escaped, seeped into Sears' building causing the explosion which resulted in plaintiff's injury.

Sears' Store was built in the summer and fall of 1936, and consists of a two story building and basement, rebuilt, from a building then on the premises, by new construction of the store front and of a rear addition 58 feet in depth. Inside, the store proper extends south from the front to a small stairway near the rear which leads upward and onto the service room where tires are mounted and batteries tested and installed as a convenience to customers. The defendant's gas main is located 3 feet below the surface and just north of center of the east and west alley paralleling Illinois street at the rear of the store. The alley 16 feet wide is brick

On August 9, 1927, plaintiff left her home alone and walked several blocks to the business district of Chicago Heights, and was about to enter a store, slowly sank to her knees, lost consciousness and was taken to a hospital where Dr. Ulle attended her and found her unconscious, suffering from a stroke with hemiplegia beginning to appear. She remained in the hospital a few days and was then brought home and confined to her bed for ten or twelve days. In December 1927, Dr. May again saw her and she was still suffering from slight paralysis of the right arm and leg, and at the time of the trial her right arm was greatly diminished in function and strength and a dragging gait of the right leg, which followed the accident, had improved to a limp.

The defendant first contends that the trial court erred in not sustaining its motion for a directed verdict and for judgment notwithstanding the verdict, claiming that there is no evidence tending to support the specific allegations of the complaint. Plaintiff alleges that the defendant had the duty of maintaining its premises so that gas would not escape and endanger human life and that it did not observe its duty, but negligently permitted its gas main at the rear of owners' store to become defective, as a result of which the illuminating gas escaped, seeped into owners' building causing the explosion which resulted in plaintiff's injury.

Owners' house was built in the summer and fall of 1920, and consists of a two story building and basement. Prior to the building then on the premises, by new construction of the store front and of a rear addition 28 feet in depth. Inside, the store proper extends south from the front to a small stairway near the rear which leads upward and onto the service room where flues are mounted and batteries tested and installed as a convenience to customers. The defendant's gas main is located 2 feet below the surface and just north of center of the back and west alley paralleling Illinois street at the rear of the store. The alley 18 feet wide is brick

paved upon a 2 inch sand cushion resting on about 3 or 4 inches of concrete, set on 12 feet of clay. The southeast and west walls of the building are brick, resting on a concrete wall 14 inches thick, extending around the basement. This wall, resting on footings 2 to 2½ feet wide and 12 inches deep. was about 14 feet deep at the rear of the building and, due to a downward slope, rose above the surface of the alley 3 inches at the east side and 8 or 9 inches at the west. There was about 4 feet of Sears' property between its building line and the alley line which waspaved with a concrete apron which extended also several feet into the alley, replacing alley bricks after a cave-in, hereinafter referred to. Between the foundation wallaand the gas main, the soil was clay. Sears' basement floor was concrete 4 inches thick and the floor of the service station concrete 6 inches thick, resting on the foundation wall. In the basement under the Service Room was a coal room fed from a coal chute,the top of which was located in and level with the concrete apron. Defendant's main, installed in 1928, was a 2 inch leadized pipe carrying illuminating gas at a pressure of 10 to 12 pounds per square inch and from which a service pipe extended through the foundation, into Sears' building 26 feet west of the Sears' east wall. No illuminating gas was used in Sears Store, and the service pipe was plugged inside. There is evidence that during the construction of the building in the preceding summer, a cave-in occurred directly at the rear of Sears' building, outside its service room doors; also that the Service Company excavated at the rear of the building in order to lay the service pipe; that about the same time a break occurred in the Service Company's system further west in the alley; that gas bubbles were seen prior to the explosion directly in the rear of the building, five minutes before,

paved upon a 8 inch sand cushion resting on about 2 or 4 inches of concrete, set on 12 feet of clay. The foundations and walls of the building are solid, resting on a concrete wall 14 inches thick, extending around the basement. This wall, resting on footings 2 to 24 feet wide and 12 inches deep, was about 14 feet deep at the rear of the building and, due to a downward slope, rose above the surface of the alley 6 inches at the east side and 2 or 3 inches at the west. There was about 4 feet of Sears' property between its building line and the alley line which was paved with a concrete apron which extended like several feet into the alley, requiring alley traffic after a cave-in, hereinafter referred to. Between the foundation wallsand the rear main, the soil was clay. Sears' basement floor was concrete 4 inches thick and the floor of the service station concrete 6 inches thick, resting on the foundation wall. In the basement under the Service Room set a steel room 7x4 feet from a steel plate, the top of which was located in and level with the concrete floor. Defendant's main, installed in 1928, was a 4 inch lead pipe carrying illuminating gas at a pressure of 10 to 12 pounds per square inch and from which a service pipe extended through the foundation, into Sears' building 22 feet west of the Sears' west wall. No illuminating gas was used in Sears store, and the service pipe was plugged inside. There is evidence that during the construction of the building in the preceding summer, a cave-in occurred directly at the rear of Sears' building, outside the service room door; that the Service Company excavated at the rear of the building in order to lay the service pipe; that about the same time a break occurred in the Service Company's system further west in the alley; that gas bubbles were seen water in the excavation directly in the rear of the building, five minutes before,

several times several days before, and several months before; that the bubbles always appeared, following rain or wet weather, on puddles in depressions in the alley directly in the rear of the building; that the order of the bubbles was illuminating gas; that illuminating gas was smelled in the rear of the store proper and in the service room prior to the explosion; that preceding the explosion there was a flame of the sameness of burning illuminating gas, a bluish-red color; that the same kind of flames was observed later in the ceiling of the rear basement, along the edges of the rear building line, about the manhole cover, and along pipes up and down the rear wall of the building; that firemen could not extinguish the flames with water; that the alley was not disturbed by the explosion; that defendant's employees following the explosion, observing bubbles in the depression where they existed before, ordered the gas shut off; that when the gas was shut off, all flames suddenly stopped; that defendant's employees thereupon excavated and found a break in the main at the point of the alley depression and that they could not say whether the break was an hour or a year old. We believe these facts and proper inferences therefrom amply tended to prove that gas escaped from a break in defendant's main and seeped into the Sears' building and that defendant with reasonable inspection - under the circumstances surrounding the alley cave-in, excavating and repairing of the main - would have had notice of the escaping gas. Accordingly, we believe the trial court properly denied defendant's motions. We need not consider the cases cited on the point for it is apparent the evidence tends to prove the specific negligence charged.

The next question concerns the manifest weight of the evidence. The defendant relies mainly upon weaknesses in plaintiff's case rather than on any defense testimony. It says there is no evidence explaining how the gas escaping from the main could possibly have entered the building in the face of the facts of

several times several days before, and several months before; that the walls were wet, following rain or wet weather, as probably in exposures in the alley directly in the rear of the building; that the odor of the bricks was illuminating gas; that illuminating gas was manifold in the rear of the store proper and in the service room prior to the explosion; that preceding the explosion there was a flame of the appearance of burning illuminating gas, a bluish-red color; that the same kind of flame was observed later in the ceiling of the rear basement, along the edge of the rear building line, about the manhole cover, and along pipes up and down the rear wall of the building; that flames could not extinguish the flames with water; that the alley was not disturbed by the explosion; that defendant's employees following the explosion, observing bubbles in the depression above they existed before, evidence the gas had off; that when the gas was shut off, all flames immediately stopped; that defendant's employees thereupon excavated and found a break in the main at the point of the alley depression and that they could not see whether the break was an hour or a year old. We believe these facts and proper inferences therefrom amply tended to prove that gas escaped from a break in defendant's main and seeped into the house, indicating that defendant with reasonable inspection - under the circumstances surrounding the alley cave-in, excavating and repairing the main - would have had notice of the escaping gas. Accordingly, we believe the trial court properly denied defendant's motions. We need not consider the cases cited on the point for it is apparent the evidence tends to prove the specific negligence charged.

The next question concerns the sufficient weight of the evidence. The defendant relies mainly upon measures in plaintiff's case rather than on any defense testimony. It says there is no evidence negativing for the gas escaping from the main could possibly have entered the building in the face of the fact of

building construction hereinbefore outlined. There is evidence of lack of adherence of the service room floor to the foundation wall, of a vent from the coal room to the service room; of possible porosity in concrete walls; and, of course, the service room doors opening into the alley, directly outside of which was the depression in which bubbles were seen. There is direct evidence of the presence of illuminating gas in Sears' basement and service room and the physical facts surrounding the explosion, leave little, if any, room for doubt that defendant's gas was in the building and that the possibility of any sewer gas having contributed to the explosion too remote for consideration. Defendant says that it is against common sense and reason that gas, having escaped from the main and relieved of the pressure therein, could have penetrated the 14 inch foundation wall. It need not have penetrated the wall to enter the building and we can not find it could not have entered the service room doors, closed or open. Defendant cites cases which hold that an inference of negligence, based on another inference will not support a claim of negligence and it contends also that the doctrine of res ipso loquitur does not apply. We agree that the doctrine of res ipso loquitur does not apply and that the accident itself was insufficient without proof of negligence to make defendant liable. Kleiber v. South Side Elevated R. R. Co., 226 Ill. App. 422. The rule of inference upon inference, however, is not applicable here. There is direct evidence that illuminating gas caused the explosion and there is direct evidence of gas escaping from defendant's main on several occasions prior to the accident. The inference drawn is that of negligence on the part of the defendant in failing to detect and correct the leak, which inference the jury was justified in drawing. The rule does not mean that only one presumption may be indulged in the proof, it means that one presumption or inference may not be based upon another. There are facts from which the jury may justifiably infer that

building construction hereinbefore outlined. There is evidence of lack of clearance of the service pipe flues in the foundation wall, of a joint from the coal room to the service room; of possible permeability in concrete walls; and, of course, the service room doors opening into the alley, directly outside of which was the excavation in which workmen were seen. There is direct evidence of the presence of illuminating gas in tenant's basement and service room and the physical facts surrounding the explosion, leave little, if any, room for doubt that defendant's gas was in the building and that the possibility of any other gas having contributed to the explosion too remote for consideration.

Defendant says that it is against common sense and reason that gas, having escaped from the main and relieved of the pressure therein, could have penetrated the 14 inch foundation wall. It need not have penetrated the wall to enter the building and we can not find it could not have entered the service room doors, closed or open. Defendant cites cases which hold that an inference of negligence, based on another inference will not support a claim of negligence and it contends also that the doctrine of res ipsa loquitur does not apply. It argues that the doctrine of res ipsa loquitur does not apply and that the contract itself was constructed without proof of negligence to make defendant liable. Eastman v. South Side Elevated R. R. Co., 208 Ill. 420. The rule of inference upon inference, however, is not applicable here. There is direct evidence that illuminating gas escaped the regulator and there is direct evidence of gas escaping from defendant's main at several occasions prior to the accident. The inference drawn is that of negligence on the part of the defendant in failing to detect and correct the leak, which inference the jury was justified in drawing. The rule does not mean that only one presumption may be indulged in the proof, it means that one presumption or inference may not be based upon another.

the illuminating gas which caused the explosion came from defendant's main and there are independent facts from which the presumption was justified that the defendant was negligent in not having detected and reported the leak prior to the accident. These presumptions may both be drawn. We believe the evidence tended to show the necessary elements of defendant's negligence and that the allegations in plaintiff's complaint were sufficient upon which to introduce the proof. Defendant recites Rockford Gas, Light & Coke Co. v. Ernst, 68 Ill. App. 300 in support of its contention that the uniform rule is that plaintiff was required to prove that the defendant by exercise of ordinary care should have discovered the leak. That case supports our view that the jury was justified in finding that the break in the pipe existed for a sufficient length of time; that defendant under the circumstances should have discovered it and, not having done so, was negligent. Defendant further says there is no evidence at all that it had any more reason to suspect a break in its main at that point, than any other break in the approximately 300 square miles of territory it serves. We disagree. The evidence of the building excavation and construction, digging by defendant, a cave-in, subsequent depression and bubbles indicate the contrary. It contends there was no showing why it should break up pavement or brick alleys to determine whether there was a break in its main. It would appear that observation of the depression holding water above the main would have been sufficient. It further contends that undisputed evidence shows that there was no way in which defendant's gas could enter the building before the explosion happened. This is founded on a theory that the explosion caused the break in the main. The presence of illuminating gas in Sears' Store prior to the explosion, with the evidence of preceding bubbles and the subsequent fact that the alley was not damaged by the explosion, demerit this theory. People's Gas Light & Coke Co.

the illuminating gas which caused the explosion came from defendant's main and there are indisputable facts from which the jury could justified that the defendant was negligent in not having detected and reported the leak prior to the accident. These propositions may be it be true. We believe the evidence tended to show the necessary elements of defendant's negligence and that the allegations in plaintiff's complaint were sufficient upon which to introduce the proof. Defendant recites Dunlavy Gas Light & Coke Co. v. Grant, 38 Ill. App. 500 in support of its contention that the uniform rule is that plaintiff was required to prove that the defendant by exercise of ordinary care should have discovered the leak. That same supports our view that the jury was justified in finding that the break in the pipe existed for a sufficient length of time; that defendant under the circumstances should have discovered it and, not having done so, was negligent. Defendant further says there is no evidence at all that it had any more reason to suspect a break in its main at that point, than any other break in the approximately 30 miles of pipe or thereabouts it serves. We disagree. The evidence of the building construction and construction, digging by defendant, of cave-in, subsequent depression and bubbles indicate the contrary. It contends there was no showing why it should have had or possessed or taken steps to determine whether there was a break in its main. It would appear that observation of the depression holding water above the main would have been sufficient. It further contends that undisputed evidence shows that there was no gas in main defendant's gas mains after the building before the explosion occurred. This is founded on a theory that the explosion caused the break in the main. The presence of illuminating gas in sewers, prior to the explosion, with the evidence of preceding building and the subsequent fact that the alley was not damaged by the explosion, discredit this theory. Dunlavy Gas Light & Coke Co.

v. Amphlett, 93 Ill. App. 194, cited by defendant on the question of manifest weight of evidence, is not applicable. We do not consider the verdict against the manifest weight of the evidence and would not, therefore, be justified in setting it aside.

We are urged to hold that the damages are excessive, defendant arguing that the accident of August 9th, and the injuries suffered then and thereafter, were not proved to be the result of the prior accident in January; that any allowance, therefore, was not proper; and that $8,200.00 for the prior damages was grossly excessive. If defendant's premise is sound, we agree, for if the condition of paralysis, which was the principal injury and suffering of plaintiff, is not attributable to the accident in January, then the damages as assessed are excessive for the injury then suffered. The question, therefore, is whether there was a causal connection between the January accident and the injuries of August 9th and thereafter.

Defendant points out that only one doctor testified that there was such a connection and that he was inexperienced, gave an ambiguous opinion based on an improper hypothetical question, while defendant's medical witnesses were two experienced brain specialists who gave definite opinions that there was no such connection , giving facts and reasoning in support of their opinions. Since there was testimony of a connection between the January accident and the later injuries suffered by plaintiff, the question of that connection was properly submitted to the jury and we should not sustain defendant in its contention unless the evidence on the point is manifestly against any finding on that element. The qualifications of the doctors, their opinions and reasons are all matters for the jury. It heard the opposite views of the doctors and while it might seem from the evidence that the positive testimony of defendant's medical witnesses should have been more convincing, we cannot substitute our view for the

v. Amphlett, 19 Ill. App. 124, cited by defendant on the question of conflict weight of evidence, is not applicable. In do not consider the verdict against the manifest weight of the evidence and would not, therefore, be justified in setting it aside.

We are urged to hold that the damages are excessive, defendant regarding that the accident of August 6th, and the injuries suffered then and thereafter, were not proved to be the result of the prior accident in January; that any allowance, therefore, was not proper; and that $3,000.00 for the prior damages was grossly excessive. If defendant's premise is sound, we agree, for if the condition of paralysis, which was the principal injury and suffering of plaintiff, is not attributable to the accident in January, then the damages as assessed are excessive for the injury then suffered. The question, therefore, is whether there was a causal connection between the January accident and the injuries of August 6th and thereafter.

Defendant points out that only one doctor testified that there was such a connection and that he was inexperienced, gave an opinion opinion based on an improper hypothetical question, while defendant's medical witnesses were the experienced brain specialists who gave definite opinions that there was no such connection, giving facts and reasoning in support of their opinions. Since there was testimony of a connection between the January accident and the later injuries suffered by plaintiff, the question of that connection was properly submitted to the jury and we should not substitute intuition in its conclusion unless the evidence on the point is manifestly against our finding on this element. The qualifications of the doctors, their opinions and reasons are all matters for the jury. It heard the opposite views of the doctors and while it might seem from the evidence that the positive testimony of defendant's medical witnesses should have been more convincing, we cannot substitute our view for the

jury's. In addition to plaintiff's expert witnesses, the other medical testimony in her behalf was definite that her paralytic condition was due to an injury to the brain. There are diametrically opposed expert opinions, with other medical testimony from which inferences helpful to plaintiff's case could easily be drawn, and we cannot say the jury's findings on this point are against the clear weight of the evidence.

Defendant complains of instruction No. 2, given on behalf of plaintiff and of instruction No. 10, given at the request of its co-defendant Sears Roebuck & Company. We believe that plaintiff's instruction No. 2 is inadequate in that it fails to state that injuries compensated for should be limited to those resulting from defendant's negligence. We believe, however, that the Service Company's instructions 21, 24, 32, 33 and 34, more than supply any deficiency in that instruction. It is urged that instruction No. 10 of Sears, Roebuck & Company assumes a controverted fact that the Service Company created a dangerous and uncertain condition in the store. We think this instruction is general enough, especially when considered with defendant's instructions Nos. 18 and 30.

Defendant claims the hypothetical question propounded to plaintiff's expert is improper because it failed to include substantial material facts and the further related contention that the expert's answer "could have been due to the accident" was too indefinite for understanding. It appears that the question under discussion did not include all the material facts. At the conclusion of the hypothetical question propounded by plaintiff's counsel to plaintiff's medical expert, defendant's counsel made an objection in which he recited facts uncontroverted in evidence and which he claimed were excluded from the question. This objection occupies nearly 8 pages in the typewritten transcript of evidence, at the end of which counsel for

jury's. In addition to plaintiff's expert testimony, the other medical testimony in her behalf was definite that her particular condition was due to an injury to the brain. There are diametrically opposed expert opinions, with medical testimony from both interests subject to plaintiff's case could easily be drawn, and we cannot say the jury's findings on this point are contrary the clear weight of the evidence.

Defendant complains of instruction No. 2, given on behalf of plaintiff and of instruction No. 10, given at the request of its co-defendant Sears Roebuck & Company. We believe that plaintiff's instruction No. 2 is inadequate in that it fails to state that injuries compensated for should be limited to those resulting from defendant's negligence. We believe, however, that the service company's instructions 23, 24, 25 and 26, more than supply any deficiency in that instruction. It is urged that instruction No. 10 of Sears, Roebuck & Company assumes a controverted fact that the service company created a dangerous and improper condition in the store. We think that a instruction is general enough, especially when considered with defendant's instructions Nos. 12 and 13.

Defendant claims the hypothetical question proposed to plaintiff's expert is improper because it failed to include substantial material facts and the further related contention that the expert's answer "could have been due to the accident" was too indefinite for understanding. It appears that the question under discussion did not include all the material facts. At the conclusion of the hypothetical question propounded by plaintiff's counsel to plaintiff's medical expert, defendant's counsel made no objection to which he recited facts uncontroverted in evidence and which he claimed were omitted from the question. This objection occupies nearly 8 pages in the transcript of evidence, at the end of which counsel for

Sears, Roebuck & Company objected to the hypothetical question, adopted the objections recited by defendant's counsel, and recited further claimed omitted facts which took up almost 5 pages of the transcript, following which there was a colloquy between the witness, court and counsel, after which the witness answered as indicated. Plaintiff's expert was cross-examined and the facts excluded from plaintiff's question were included in the hypothetical questions put to the medical witnesses for the defendant. Under these circumstances, and giving the expert witnesses' testimony its due value, we cannot say that any prejudice has been shown to the defendant by the question or answer which would justify setting aside the jury's verdict in this case.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HAMEL, J. CONCUR.

Here, Jackson's Company objected to the hypothetical question, adopted the objections raised by opponent's counsel, and results therefrom claimed omitted facts which took up about 2 pages of the transcript, following which there was a colloquy between the attorneys, court and counsel, after which the witness answered in detail. Plaintiff's expert was cross-examined and the facts contained from plaintiff's question were included in the hypothetical question put to the medical witnesses for the defendant. Under these circumstances, and giving the expert witnesses' testimony its due value, we cannot say that any prejudice has been shown to the defendant by the question or answer which would justify setting aside the jury's verdict in this case.

JUDGMENT AFFIRMED.

Moore, P.J. and Hill, J. concur.

40482

ELIZABETH McMANIMEN, Appellee, v. PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation, Appellant, and SEARS, ROEBUCK AND COMPANY, a corporation, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

ON REHEARING.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

We have reconsidered the above entitled cause and have decided to adhere to our former decision as set forth in the opinion filed by this court on Wednesday, December 9, 1942.

For the reasons set forth in our former opinion, the judgment of the Superior Court is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.

ELIZABETH MORANIAN, Appellee, v. PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, a corporation, Appellant, and SIARS, ROEBUCK AND COMPANY, a corporation, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

OPINION FILED.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

We have reconsidered the above entitled cause and have decided to adhere to our former decision as set forth in the opinion filed by this court on Wednesday, December 9, 1942.

For the reasons set forth in our former opinion, the judgment of the superior Court is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND BURNS, J. CONCUR.

41779

317 I.A. 650

BERNICE PAUL,
(Plaintiff) Appellee,
v.
CHARLES SHUKES, et al.,
(Defendants)

On Appeal of JOSEPH D. STEWART,
(Defendant) Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff in this action, Bernice Paul, as assignee of John Latoza, filed a bill in chancery to foreclose a claim for mechanic's lien in the sum of $5,299.13 on property at 2944-46 Lexington Street, Chicago, Illinois.

The defendant herein, as the record owner of the title to the premises, answered the complaint, alleging that he held the title for Jadviga Latoza the wife of John Latoza. The cause was referred to a master in chancery who heard the evidence and the suggestions which were offered in support of the complaint and amended answer that was filed. The master disallowed certain parts of the claim for the reason that John Latoza was the husband of Jadviga Latoza and under the Illinois Husband and Wife Act (1940 Illinois Rev. Stat., Chap. 68, Par. 8) could not claim compensation against her for services rendered to her property. The master allowed a mechanic's lien claim in the reduced amount of $1,496.22 plus interest and costs against the defendant. The $1,496.22 allowed was not for materials or services furnished by John Latoza but was for moneys he claimed to have paid to other contractors, which moneys were claimed to have been originally loaned by the plaintiff to John Latoza. Both plaintiff and defendant filed objections to the master's report, which were overruled by the master. Said objections were ordered to stand

[Ignore Del. Stat. Ann. 64.08]

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41779

BERNICE FAUL,

(Plaintiff) Appellee,

v.

CHARLES KRUEGER, et al.,

(Defendants)

On Appeal of JOHN C. STEWART,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE HERRN DELIVERED THE OPINION OF THE COURT.

The plaintiff in this action, Bernice Faul, as assignee of John Latoza, filed a bill in chancery to foreclose a claim for mechanic's lien in the sum of $5,000. It on property at 2944-46 Lexington Street, Chicago, Illinois.

The defendant herein, as the record owner of the title to the premises, answered the complaint, alleging that he held the title for Ladvigo Latoza the wife of John Latoza. The cause was referred to a master in chancery who heard the evidence and the suggestions which were offered in support of the complaint and amended answer that was filed. The master disallowed certain parts of the claim for the reason that John Latoza was the husband of Ladvigo Latoza and under the Illinois Husband and Wife Act (1940 Illinois Rev. Stat., Chap. 68, Par. 8) could not claim compensation against her for services rendered to her property. The master allowed a mechanic's lien claim in the reduced amount of $1,498.22 plus interest and costs against the defendant. The $1,498.22 allowed was not for materials or services furnished by John Latoza but was for moneys he claimed to have paid to other contractors, which moneys were claimed to have been originally loaned by the plaintiff to John Latoza. Both plaintiff and defendant filed objections to the master's report, which were overruled by the master. Said objections were ordered to stand

as exceptions to the master's report by the chancellor, who overruled said exceptions and on motion of the plaintiff a decree was entered in accordance with the report of the master. The appeal by defendant Stewart is from that portion of the decree allowing a mechanic's lien for $1,496.22 plus interest and assessing costs against him.

The plaintiff's complaint alleged that Charles Shukes and Polly Shukes, his wife, owned the premises at 2944-46 Lexington Street, Chicago; that defendant had some interest therein; that John Latoza had entered into an oral contract with the Shukes or their agent, to remodel and improve the property; that John Latoza thereafter furnished materials and performed labor on the premises under said contract and completed same on August 27, 1938. On October 10, 1938, Latoza filed a mechanic's lien claim for $6,082.52 therefor, and on December 5, 1938 assigned said claim to plaintiff.

Defendant's amended answer denied that the Shukes were owners of the premises and alleged that they held the premises in trust for Jadviga Latoza; that defendant now holds legal title for certain beneficiaries; that John Latoza at all times had knowledge of those facts; that services, materials or labor furnished by John Latoza were not of a nature to create a mechanic's lien; that plaintiff paid no money to Latoza, has no real interest in the proceedings and is a mere dummy of John Latoza; that John Latoza and Jadviga Latoza were married in 1935, and desiring an income-bearing property to support themselves in old age, Jadviga Latoza borrowed $3,500 from Mona Himmelright, her daughter by a former marriage, who is not a party to this proceeding, and purchased the premises in question; that it was understood that Jadviga Latoza should have a life estate in the property and upon her death the property would descend to Mona Himmelright in consideration

as exceptions to the master's report by the chancellor, who overruled said exceptions and on motion of the plaintiff a decree was entered in accordance with the report of the master. The appeal by defendant Stewart is from that portion of the decree allowing a mechanic's lien for $1,496.22 plus interest and assessing costs against him.

The plaintiff's complaint alleged that Charles Shukes and Polly Shukes, his wife, owned the premises at 2944-46 Lexington Street, Chicago; that defendant had some interest therein; that John Latoza had entered into an oral contract with the Shukes or their agent, to remodel and improve the property; that John Latoza thereafter furnished materials and performed labor on the premises under said contract and completed same on August 27, 1938. On October 10, 1938, Latoza filed a mechanic's lien claim for $1,082.32 therefor, and on December 3, 1938 assigned said claim to plaintiff.

Defendant's amended answer denied that the Shukes were owners of the premises and alleged that they held the premises in trust for Ladviga Latoza; that defendant now holds legal title for certain beneficiaries; that John Latoza at all times had knowledge of those facts; that services, materials or labor furnished by John Latoza were not of a nature to create a mechanic's lien; that plaintiff paid no money to Latoza, has no real interest in the proceedings and is a mere dummy of John Latoza; that John Latoza and Ladviga Latoza were married in 1935, and desiring an income-bearing property to support themselves in old age, Ladviga Latoza borrowed $3,500 from Mona Himmelright, her daughter by a former marriage, who is not a party to this proceeding, and purchased the premises in question; that it was understood that Ladviga Latoza should have a life estate in the property and upon her death the property would descend to Mona Himmelright in consideration

of moneys advanced by her; that title was taken in the names of Charles Shukes and Polly Shukes who held it as trustees for Jadviga Latoza; that it was further understood that John Latoza and Jadviga Latoza would mutually manage and repair the premises and use income thereof, after payment of operating expenses, for support of themselves so long as John Latoza continued to live with Jadviga Latoza as husband and wife; that they did so manage the premises and make repairs by their mutual cooperation until shortly prior to the filing of the complaint herein when John Latoza is alleged to have become quarrelsome and to have deserted Jadviga Latoza and stated he would file a large claim upon the premises to harass her and compel her to pay him a large sum of money, and that this proceeding was brought for that purpose.

The plaintiff did not file a reply to the answer of the defendant.

Upon the entry of the decree by the court Joseph D. Stewart appealed from it and urges that the court erred in that portion of the decree finding that John Latoza paid $1,496.22 for materials and services, alleging it to be contrary to the weight of the evidence, and that the portion of the decree directing defendant to pay $1,496.22 together with interest and costs and finding that plaintiff has a mechanic's lien for that amount is erroneous.

Defendant urges, in support of his suggestion of error, that the Illinois Mechanic's Lien Act does not permit or create a mechanic's lien for moneys loaned or advanced to persons for the payment for materials and services furnished upon real estate; and that, therefore, that portion of the decree ordering a mechanic's lien is erroneous.

The facts in this record as suggested are that the court entered a decree and found the premises in question to be the property of Jadviga Latoza and that John Latoza was her husband.

of moneys advanced by her; that title was taken in the names of Charles Burkes and Polly Burkes who held it as trustees for Ladviga Latoza; that it was further understood that John Latoza and Ladviga Latoza would mutually manage and repair the premises and use income thereof, after payment of operating expenses, for support of themselves so long as John Latoza continued to live with Ladviga Latoza as husband and wife; that they did so manage the premises and make repairs by their mutual cooperation until shortly prior to the filing of the complaint herein when John Latoza is alleged to have become quarrelsome and to have deserted Ladviga Latoza and stated he would file a large claim upon the premises to harass her and compel her to pay him a large sum of money, and that this proceeding was brought for that purpose.

The plaintiff did not file a reply to the answer of the defendant.

Upon the entry of the decree by the court Joseph D. Stewart appealed from it and urges that the court erred in that portion of the decree finding that John Latoza paid $1,498.22 for materials and services, alleging it to be contrary to the weight of the evidence, and that the portion of the decree directing defendant to pay $1,498.22 together with interest and costs and finding that plaintiff has a mechanic's lien for that amount is erroneous.

Defendant urges, in support of his suggestion of error, that the Illinois Mechanic's Lien Act does not permit or create a mechanic's lien for moneys loaned or advanced to persons for the payment for materials and services furnished upon real estate; and that, therefore, that portion of the decree ordering a mechanic's lien is erroneous.

The facts in this record as suggested are that the court entered a decree and found the premises in question to be the property of Ladviga Latoza and that John Latoza was her husband.

The decree further found that because Section 8 of the Husband and Wife Act (Chapter 68) John Latoza was not entitled to receive any compensation for labor performed and services furnished to his wife's property.

The decree was entered on the motion of the plaintiff. The mechanic's lien allowed to the plaintiff was not for materials or services furnished to the premises, but for moneys alleged to have been borrowed from the plaintiff by John Latoza and in turn alleged by him to have been paid to other contractors, in the sum of $1,496.22. The defendant, however, contends that said moneys were not paid or advanced as above stated, and that even though the moneys were so advanced by plaintiff, plaintiff did not acquire a mechanic's lien by reason of such moneys advanced and so loaned. The defendants urge that the plaintiff has not proved by a preponderance of the evidence that John Latoza paid $1,496.22 allowed in the decree, or any amount, for the materials, services and items which make up the total of $1,496.22 allowed in the decree; that the only witness offered by the plaintiff to prove the payments by John Latoza of $1,496.22 allowed in the decree was John Latoza himself. It is testimony that it is alleged is not supported by that of any other witness, and that it is not to be believed, for the reason that disinterested witnesses testified categorically to the contrary, and it is urged that John Latoza's testimony is false and untrue, and they point to the following evidence that appears in the record: He testified that the property in question belonged to Charles Shukes, and that Shukes ordered him to make repairs on said property at the rate of $1.50 per hour for his labor. Charles Shukes, who was disinterested in the outcome of these proceedings, flatly denied this, and stated that he took title only at Mrs. Latoza's request, that he never asked Mr. Latoza to make any repairs and that Mr. Latoza never asked him for money for any material or

The decree further found that because section 8 of the Husband and Wife Act (Chapter 68) John Latona was not entitled to receive any compensation for labor performed and services furnished to his wife's property.

The decree was entered on the motion of the plaintiff. The mechanic's lien allowed to the plaintiff was not for materials or services furnished to the premises, but for moneys alleged to have been borrowed from the plaintiff by John Latona and in turn alleged by him to have been paid to other contractors, in the sum of $1,496.22. The defendant, however, contends that said moneys were not paid or advanced as above stated, and that even though the moneys were so advanced by plaintiff, plaintiff did not acquire a mechanic's lien by reason of such moneys advanced and so loaned. The defendants urge that the plaintiff has not proved by a preponderance of the evidence that John Latona paid $1,496.22 allowed in the decree, or any amount, for the materials, services and items which make up the total of $1,496.22 allowed in the decree; that the only witness offered by the plaintiff to prove the payments by John Latona of $1,496.22 allowed in the decree was John Latona himself. It is testimony that it is alleged is not supported by that of any other witness, and that it is not to be believed, for the reason that disinterested witnesses testified categorically to the contrary, and it is urged that John Latona's testimony is false and untrue, and they point to the following evidence that appears in the record: He testified that the property in question belonged to Charles Hunter, and that Hunter ordered him to make repairs on said property at the rate of $1.50 per hour for his labor. Charles Hunter, who was disinterested in the outcome of these proceedings, flatly denied this, and stated that he took title only at Mrs. Latona's request, that he never asked Mr. Latona to make any repairs and that Mr. Latona never asked him for money for any material or

labor furnished. Polly Shukes, wife of Charles Shukes, testified that she and her husband were to hold title for Mr. and Mrs. Latoza. She further stated that she and her husband never put any money in the property and never asked Mr. Latoza to do any work on the property.

It is evident, as suggested by the defendant, that John Latoza knew the property was owned by Mrs. Latoza and not by Charles Shukes. The plaintiff testified that John Latoza told her that he and his wife, Jadviga Latoza owned the property, and that he, John Latoza, desired to borrow $2,000 from the plaintiff to repair the property.

John Latoza testified to work done by Frank H. Leonhardt and to further payments made to him; also to South Center Plumbing & Heating Supply Co.; to Rudolph Lindvall; to Columbus Coal Company; and to A & A Boiler Works.

Frank H. Leonhardt, a disinterested witness, denied doing any work on the building or receiving any money. The following other disinterested witnesses also denied Latoza's testimony concerning payments of money to them by John Latoza and further testified that Mrs. Latoza made all payments to them: William Cohen, president of South Center Plumbing & Heating Supply Co.; Rudolph Lindvall; Frank S. Dring, president of Columbus Coal Co.; and Abraham Sokoloff, treasurer of A. & A Boiler Works. It appears also that Latoza testified he worked on the building in question from July 21, 1936 to July 27th, inclusive, notwithstanding that Defendant's Exhibit 1, being a mittimus issued out of the Superior Court of Cook County, Illinois and admitted to the record, bore a return of the sheriff that said John Latoza, the respondent named in said writ, was committed to the Cook County Jail, pursuant to the command thereof, on July 20th and was not released from custody until July 28, 1936.

labor furnished. Polly Shukes, wife of Charles Shukes, testified that she and her husband were to hold title for Mr. and Mrs. Latoza. She further stated that she and her husband never put any money in the property and never asked Mr. Latoza to do any work on the property.

It is evident, as suggested by the defendant, that John Latoza knew the property was owned by Mrs. Latoza and not by Charles Shukes. The plaintiff testified that John Latoza told her that he and his wife, Ladvige Latoza owned the property, and that he, John Latoza, desired to borrow $2,000 from the plaintiff to repair the property.

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The defendant further suggests that from this record the testimony of John Latoza is proven false and that no part of the same can be accorded any weight because none of his testimony was corroborated by any other witness. Thompson v. Northern Hotel Co., 256 Ill. 77; Hadley v. White, 367 Ill. 406. The defendant offered positive testimony that John Latoza did not pay the items which made up the total of $1,496.22 that is allowed in the decree, and as to $536.66 of that amount the witness Lindvall testified that it was Mrs. Latoza who paid it to him. As to the balance of the items which make up the sum of $1,496.22, Jadviga Latoza testified that she paid for them with moneys collected out of the rents or borrowed from persons not parties to this proceeding.

In the case at bar the chancellor approved the master's findings, and such findings approved by the chancellor will not be set aside unless manifestly against the weight of the evidence. In passing upon these questions the master in chancery sees the witnesses who appear before him, and has a better opportunity to determine the credibility of the witnesses than the Appellate court. He can pass upon the manner of witnesses in testifying, their conduct on the witness stand, their apparent truthfulness, or lack of truthfulness, etc., which are matters incapable of review by this court.

In the case of Pasedach v. Auw, 364 Ill. 491, the Supreme Court said:

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Keuper v. Mette, 239 Ill. 586). His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Kelkamp v. Kelkamp, 275 id. 98."

The defendant further suggests that from this record the testimony of John Latora is proven false and that no part of the same can be accorded any weight because none of his testimony was corroborated by any other witness. Thompson v. Northern Hotel Co., 256 Ill. 77; Hadley v. White, 367 Ill. 408. The defendant offered positive testimony that John Latora did not pay the items which made up the total of $1,498.22 that is allowed in the decree, and as to $536.85 of that amount the witness Lindvall testified that it was Mrs. Latora who paid it to him. As to the balance of the items which make up the sum of $1,498.22, Advija Latora testified that she paid for them with money collected out of the rents or borrowed from persons not parties to this proceeding.

In the case at bar the chancellor approved the master's findings, and such findings approved by the chancellor will not be set aside unless manifestly against the weight of the evidence. In passing upon these questions the master in chancery sees the witnesses who appear before him, and has a better opportunity to determine the credibility of the witnesses than the Appellate court. He can pass upon the manner of witnesses in testifying, their conduct on the witness stand, their apparent truthfulness, or lack of truthfulness, etc., which are matters incapable of review by this court.

In the case of Pasadean v. Ruw, 364 Ill. 491, the Supreme Court said:

> "The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Kuppe v. Mette, 239 Ill. 588.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Tank and Door Co. v. Heath, 295 Ill. 318; Kalkamp v. Kalkamp, 279 id. 98."

To the like effect is Brainard v. Brainard, 373 Ill. 459, 461.

The plaintiff in this case has filed an additional abstract herein so that this court can review the facts presented to the master. Defendant failed to include in the record the exhibits introduced before the master and which were considered by him in making his findings. Plaintiff calls attention to the fact that the additional abstract contains the testimony of all the witnesses who testified in this case and particular attention is called to the testimony of John Latoza and Bernice Paul, called as witnesses for the plaintiff, and to the testimony of Jadviga Latoza called as a witness for the defendant. An examination of the testimony of these three witnesses will readily disclose the real issue in this case as well as the defense interposed thereto. The plaintiff also calls the court's attention to the fact that the exhibits in the case, lettered A to L, are important and examination of the exhibits will disclose that in a majority of instances the material was billed direct to John Latoza, and the court's attention is called to the failure on the part of the defendant to supply the court with the complete abstract of the entire record.

When we come to consider the facts as they are called to our attention by the abstracts such as were prepared by the plaintiff and defendant, it cannot be said that the trial court's decree is against the manifest weight of the evidence.

The plaintiff contends that she does not claim a mechanic's lien for moneys loaned or advanced to persons for the payment of materials and services furnished upon real estate, but claims that John Latoza was a general contractor as found by the master and chancellor, and that plaintiff is entitled to recover any and all amounts paid by John Latoza for material or to sub-contractors.

Of course, as it is suggested, an original contractor is one who enters into an express or implied valid contract with

To the like effect is Reinhard v. Reinhard, 372 Ill. 422, 461.

The plaintiff in this case has filed an additional abstract herein so that this court can review the facts presented to the master. Defendant failed to include in the record the exhibits introduced before the master and which were considered by him in making his findings. Plaintiff calls attention to the fact that the additional abstract contains the testimony of all the witnesses who testified in this case and particular attention is called to the testimony of John Latoza and Bernice Paul, called as witnesses for the plaintiff, and to the testimony of Gadviga Latoza called as a witness for the defendant. An examination of the testimony of these three witnesses will readily disclose the real issue in this case as well as the defense interposed thereto. The plaintiff also calls the court's attention to the fact that the exhibits in the case, lettered A to L, are important and examination of the exhibits will disclose that in a majority of instances the material was billed direct to John Latoza, and the court's attention is called to the failure on the part of the defendant to supply the court with the complete abstract of the entire record.

When we come to consider the facts as they are called to our attention by the abstracts such as were prepared by the plaintiff and defendant, it cannot be said that the trial court's decree is against the manifest weight of the evidence.

The plaintiff contends that she does not claim a mechanic's lien for moneys loaned or advanced to persons for the payment of materials and services furnished upon real estate, but claims that John Latoza was a general contractor as found by the master and chancellor, and that plaintiff is entitled to recover any and all amounts paid by John Latoza for material or to sub-contractors.

Of course, as it is suggested, an original contractor is one who enters into an express or implied valid contract with

[Jones Ill. State. Ann. 74.01]

the owner of real property or his duly authorized agent, or with one whom the owner has knowingly permitted to contract, for the construction of an improvement and the furnishing of labor and material thereon. (Sec. 1, Chap. 82, ~~Smith-Hurd's~~ Revised Statutes).

The court found by its decree (Par. 8) that was entered that:

"Jadviga Latoza entered into a verbal contract with the said John Latoza to do the necessary repairs, improvements and alterations to be made in and upon said premises and to furnish the necessary materials therefor. That after the said Charles Shukes and Polly Shukes had taken title to the aforesaid premises, the said John Latoza, Jadviga Latoza and the said Shukes examined said building and premises and discussed the necessary repairs, alterations and improvements to be made thereon. The court further finds that in accordance with said verbal contract, the said John Latoza with the knowledge, consent and permission of the said Charles Shukes and Polly Shukes, on October 16, 1935, commenced repairing, improving and altering said premises; that the said John Latoza worked in and upon said premises from time to time for approximately two years; that during said time the said Jadviga Latoza and the said Shukes visited said building on many occasions and discussed with him the repairs and improvements."

And further, paragraph 11 of the decree finds:

"That the said John Latoza paid the following Companies for materials furnished and labor performed in connection with the installation of said materials and repairs upon said premises, to-wit: (naming companies and amounts)."

It is contended by plaintiff that John Latoza was an original contractor, that he had the right to hire sub-contractors and to purchase materials in order to make the repairs under his contract and that to say that he could not recover for moneys expended by him in doing so would defeat the purpose of the Mechanic's Lien Act.

On the question as to the defendant's appeal from the portion of the decree allowing a mechanic's lien claim for $1,496.22, the plaintiff admits the contention made by the defendant that the plaintiff could have no mechanic's lien for mere advancement of moneys to pay for materials and labor. In the plaintiff's brief we find this statement in bold face type: "Plaintiff does not claim a mechanic's lien 'for moneys loaned or advanced to persons for the payment of materials and services furnished upon real estate,'"

the owner of real property or his duly authorized agent, or with one whom the owner has knowingly permitted to contract, for the construction of an improvement and the furnishing of labor and material thereon. (Sec. 1, Chap. 82, Smith-Hurd's Revised Statutes).

The court found by its decree (par. 8) that was entered that:

"Ladvigs Latoxa entered into a verbal contract with the said John Latoxa to do the necessary repairs, improvements and alterations to be made in and upon said premises and to furnish the necessary materials therefor. That after the said Charles Shukes and Polly Shukes had taken title to the aforesaid premises, the said John Latoxa, Ladvigs Latoxa and the said Shukes examined said building and premises and discussed the necessary repairs, alterations and improvements to be made thereon. The court further finds that in accordance with said verbal contract, the said John Latoxa with the knowledge, consent and permission of the said Charles Shukes and Polly Shukes, on October 18, 1933, commenced repairing, improving and altering said premises; that the said John Latoxa worked in and upon said premises from time to time for approximately two years; that during said time the said Ladvigs Latoxa and the said Shukes visited said building on many occasions and discussed with him the repairs and improvements."

And further, paragraph 11 of the decree finds:

"That the said John Latoxa paid the following Companies for materials furnished and labor performed in connection with the installation of said materials and repairs upon said premises, to-wit: (naming companies and amounts)."

It is contended by plaintiff that John Latoxa was an original contractor, that he had the right to hire sub-contractors and to purchase materials in order to make the repairs under his contract and that to say that he could not recover for moneys expended by him in doing so would defeat the purpose of the Mechanic's Lien Act.

On the question as to the defendant's appeal from the portion of the decree allowing a mechanic's lien claim for $1,496.22, the plaintiff admits the contention made by the defendant that the plaintiff could have no mechanic's lien for mere advancement of moneys to pay for materials and labor. In the plaintiff's brief we find this statement in bold face type: "Plaintiff does not claim a mechanic's lien 'for moneys loaned or advanced to persons for the payment of materials and services furnished upon real estate.'"

and plaintiff further admits that John Latoza did pay compensation for materials furnished and labor performed for the $1,496.22.

It is suggested by the defendant, that plaintiff's only answers are that, "John Latoza was a general contractor," and that "the lien allowed the plaintiff was allowed by virtue of a judgment on a mechanic's lien from John Latoza."

It is to be noted that the decree of the court finds that Jadviga Latoza entered into a verbal contract with said John Latoza, her husband, to do necessary repairs, improvements and alterations to be made in and upon said premises and to furnish the necessary materials therefor. And it further appears from the decree that after Charles and Polly Shukes had taken the title to the premises, John Latoza, Jadviga Latoza, and the Shukes visited the building and premises and discussed the necessary repairs, and as a result of this finding the court provided in the decree that in accordance with the said verbal contract John Latoza, with knowledge, consent and permission of the Shukes, commenced repairing, and that his wife, Jadviga Latoza and the Shukes visited the building on many occasions and discussed with him the repairs and improvements that were being made. It is to be noted that at no time during the time that the property was being improved as provided for did Mrs. Jadviga Latoza object, verbally or in writing, against the provisions for the improvement.

It is the rule of law that is controlling in matters of this kind where a husband and wife are in dispute regarding the improvement, as was said in the case of Janisch v. Reynolds, 254 Ill. App. 569, that the owner of real property, whose husband contracts in her absence and without her knowledge for an improvement upon such property in her behalf, is presumed to have assented thereto, where she not only fails to protest upon learning of the contract but also with full knowledge of its essential provisions permits the work to go on and accepts the benefits thereby accruing to her

and plaintiff further states that John Latoxa did pay compensation for materials furnished and labor performed for the $1,498.29.

It is suggested by the defendant, that plaintiff's only answers are that, "John Latoxa was a general contractor," and that "the lien allowed the plaintiff was allowed by virtue of a judgment on a mechanic's lien from John Latoxa."

It is to be noted that the decree of the court finds that Ladvige Latoxa entered into a verbal contract with said John Latoxa, her husband, to do necessary repairs, improvements and alterations to be made in and upon said premises and to furnish the necessary materials therefor. And it further appears from the decree that after Charles and Polly Shukes had taken the title to the premises, John Latoxa, Ladvige Latoxa, and the Shukes' visited the building and premises and discussed the necessary repairs, and as a result of this finding the court provided in the decree that in accordance with the said verbal contract John Latoxa, with knowledge, consent and permission of the Shukes, commenced repairing, and that his wife, Ladvige Latoxa and the Shukes visited the building on many occasions and discussed with him the repairs and improvements that were being made. It is to be noted that at no time during the time that the property was being improved as provided for did Mrs. Ladvige Latoxa object, verbally or in writing, against the provisions for the improvement.

It is the rule of law that is controlling in matters of this kind where a husband and wife are in dispute regarding the improvement, as was said in the case of Jenkins v. Reynolds, 254 Ill. App. 389, that the owner of real property, whose husband contracts in her absence and without her knowledge for an improvement upon such property in her behalf, is presumed to have assented thereto, where she not only fails to protest upon learning of the contract but also with full knowledge of its essential provisions permits the work to go on and accepts the benefits thereby accruing to her

title. The court in its opinion said:

"Sections 1 and 3 of the present Mechanic's Liens law, Cahill's St. ch. 82, par. 1 and 3, which must be construed together, seem to lay down a simple and just rule applicable to such a situation. Section 1 provides for a lien where a 'contract or contracts, express or implied, or partly expressed or implied' are made by the owner, or with one whom the owner 'knowingly permitted to contract for the improvement.' It also provides that the lien given shall be superior to any right of dower of husband or wife in the premises, 'provided, the owner of such dower interest had knowledge of such improvement and did not give written notice of his or her objection to such improvement before the making thereof.'"

Section 3 of the same act, Cahill's St. ch. 82, par. 3, expressly provides:

"If any such services or labor are performed upon or materials are furnished for lands belonging to any married woman, with her knowledge and not against her protest in writing as provided in section 1 of this act, in pursuance of a contract with the husband of such married woman, the person furnishing such labor or materials shall have a lien upon such property, the same as if such contract had been made with the married woman."

These two sections must be construed together. The court further said:

"It would not, we think, be difficult to distinguish the cases relied on from the record before us. It will be sufficient to say that defendant is not held liable without a contract; on the contrary, the proof is undisputed that the husband entered into a contract, and that the wife having knowledge of its essential provisions, made no protest. Not only did she fail to protest, but she accepted the benefits of this contract made in her behalf with full knowledge, as the master found, of the essential provisions of the contract. The law therefore presumes her assent to the contract made in her behalf. She is presumably held to know the statute which provides a way in which she could have avoided liability if she desired to do so. She did not avail herself of this provision and is therefore bound by the contract made in her behalf by her husband."

Applying the rule as suggested by this court in the opinion just cited, the question is, Was the court fully justified in finding and allowing a mechanic's lien for the amount that is claimed? Mrs. Jadviga Latoza had knowledge and, as we have already indicated, never objected to the continuance of the work that was improving the property and of which she took advantage, and under

title. The court in its opinion said:

"Sections 1 and 3 of the present mechanic's lien law, Cahill's St. ch. 82, Par. 1 and 3, which must be construed together, seem to lay down a simple and just rule applicable to such a situation. Section 1 provides for a lien where a 'contract or contracts, express or implied, or partly expressed or implied' are made by the owner, or with one who the owner 'knowingly permitted to contract for the improvement.' It also provides that the lien given shall be superior to any right of dower of husband or wife in the premises, 'provided, the owner of such dower interest had knowledge of such improvement and did not give written notice of his or her objection to such improvement before the making thereof.'"

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These two sections must be construed together. The court further said:

"It would not, we think, be difficult to distinguish the cases relied on from the record before us. It will be sufficient to say that defendant is not held liable without a contract; on the contrary, the proof is undisputed that the husband entered into a contract, and that the wife having knowledge of the essential provisions, made no protest. Not only did she fail to protest, but she accepted the benefits of this contract made in her behalf with full knowledge, as the master found, of the essential provisions of the contract. The law therefore presumes her assent to the contract made in her behalf. She is presumably held to know the statute which provides a way in which she could have avoided liability if she desired to do so. She did not avail herself of this provision and is therefore bound by the contract made in her behalf by her husband."

Applying the rule as suggested by this court in the opinion just cited, the question is, Was the court fully justified in finding and allowing a mechanic's lien for the amount that is claimed? Mrs. Jadwiga Latosa had knowledge and, as we have already indicated, never objected to the continuance of the work that was improving the property and of which she took advantage, and under

the circumstances it is but fitting that this mechanic's lien which was allowed by the court should meet with this court's approval.

There is a further question as to the cross-appeal that was claimed by the plaintiff, and the suggestion that is made that it should be remembered that the defendant appealed only from that portion of the decree allowing a mechanic's lien in the sum of $1496.22 plus interest and assessing the costs against the defendant. The plaintiff has admitted that this is the record on this appeal in her brief. It would, therefore, seem elementary that the argument in this appeal should be confined to the issue of upholding or reversing that portion of the decree. It appears that the plaintiff has injected in her brief arguments and a prayer to reverse another portion of the decree from which no appeal or cross-appeal was taken by either side, to-wit, the portion of the decree which disallowed $1137.12 claimed by the plaintiff for materials and services furnished by a husband to his wife for which no compensation could be allowed because of the provisions of Section 8 of the Husband and Wife Act. The defendant contends that the plaintiff cannot now ask this court to reverse or "correct" that portion of the decree, and states that on July 15, 1941, defendant moved to strike the paragraphs of plaintiff's brief and argument which urged such reversal or "correction," on the several grounds mentioned in defendant's reply brief.

It appears from the record that the plaintiff did not serve a notice of cross-appeal, and therefore, it is contended, cannot now take a cross-appeal and assign cross-errors, because plaintiff has not complied with Supreme Court Rule 35, adopted by this court in Rule 4, which requires

the circumstances it is but fitting that this mechanic's lien which was allowed by the court should meet with this court's approval.

There is a further question as to the cross-appeal that was claimed by the plaintiff, and the suggestion that is made that it should be remembered that the defendant appealed only from that portion of the decree allowing a mechanic's lien in the sum of $1,490.24 plus interest and necessitating the costs against the defendant. The plaintiff has analyzed that this is the record on this appeal in her brief. It would, therefore, seem elementary that the argument in this appeal should be confined to the issue of upholding or reversing that portion of the decree. It appears that the plaintiff has injected in her brief arguments and a prayer to reverse another portion of the decree from which no appeal or cross-appeal was taken by either side, to-wit, the portion of the decree which disallowed $1,327.15 claimed by the plaintiff for materials and services furnished by a husband to his wife for which no compensation could be allowed because of the provisions of Section 8 of the Husband and Wife Act. The defendant contends that the plaintiff cannot now ask this court to reverse or "correct" that portion of the decree, and states that on July 15, 1941, defendant moved to strike the paragraphs of plaintiff's brief and argument which urged such reversal or "correction," on the several grounds mentioned in defendant's reply brief.

It appears from the record that the plaintiff did not serve a notice of cross-appeal, and therefore, it is contended, cannot now take a cross-appeal and assign cross-errors, because plaintiff has not complied with Supreme Court Rule 30, adopted by this court in Rule 4, which requires

service of Notice of Cross-Appeal. (Smith-Hurd Ill. Rev. Stat., Chap. 110, Par. 259.35): [Jones Ill. State. Ann. 105, 35]

"Each appellee who desires to prosecute a cross appeal from all or any part of the . . . decree . . . shall within 10 days after service of notice of appeal, serve a notice upon each party . . . It. . . shall be designated 'Notice of Cross Appeal,'. . ."

In a case that has been called to our attention, entitled First-Trust Joint Stock Land Bank of Chicago v. Cutler, 286 Ill. App. 6 at page 9, the court said in reference to this rule:

"Inasmuch as this rule is mandatory and not directory, and since the notice of cross appeal . . . was not filed until more than 10 days after the appellant's notice of appeal, we are constrained to hold that such cross appeal is not effective. For the reasons heretofore stated, the appeal and cross appeal are hereby dismissed."

Plaintiff, however, cited Rule 39 of the Supreme Court of Illinois and Kilburg v. Petrolagar Laboratories, Inc., 280 Ill. App. 527, and McNulty v. Hotel Sherman Company, 280 Ill. App. 325, as authority that appellee may assign cross errors without taking a cross-appeal, but it is significant that in both of the above cases the appellee had prevailed in the lower court and assigned cross-errors to uphold the judgment of the lower court. It is contended that it is permissible under Rule 39, but only for the purpose of upholding the order or decree of the lower court and not for the purpose of reversing or "correcting" said order or decree. In the case at bar, the plaintiff seeks to reverse that portion of the decree wherein the chancellor disallowed the claim of $1137.12 and asked the Appellate court to add said $1137.12 to the decree.

It appears that the decree that was entered by the court was entered on plaintiff's motion, and it would appear that the plaintiff cannot attempt to appeal from, assign error upon or "correct" a decree which plaintiff asked the trial court to enter, upon plaintiff's motion. In Newman v. Dick, 23 Ill. 338 at page 339, the court held that,

service of Notice of Cross-Appeal. (Smith-Hurd Ill. Stat. Chap. 110, Par. 259.33):

"Each appellee who desires to prosecute a cross appeal from all or any part of the . . . decree . . . shall within 10 days after service of notice of appeal, serve a notice upon each party . . . It. . . shall be designated 'Notice of Cross Appeal'. . . ."

In a case that has been called to our attention, entitled First-Trust Joint Stock Land Bank v. Cutler, 358 Ill. App. 6 at page 9, the court said in reference to this rule:

"Inasmuch as this rule is mandatory and not directory, and since the notice of cross appeal . . . was not filed until more than 10 days after the appellant's notice of appeal, we are constrained to hold that such cross appeal is not effective. For the reasons heretofore stated, the appeal and cross appeal are hereby dismissed."

Plaintiff, however, cited Rule 39 of the Supreme Court of Illinois and Kilbury v. Petroleum Laboratories, Inc., 280 Ill. App. 527, and McNulty v. Hotel Sherman Company, 280 Ill. App. 528, as authority that appellee may assign cross errors without taking a cross-appeal, but it is significant that in both of the above cases the appellee had prevailed in the lower court and assigned cross-errors to uphold the judgment of the lower court. It is contended that it is permissible under Rule 39, but only for the purpose of upholding the order or decree of the lower court and not for the purpose of reversing or "correcting" said order or decree. In the case at bar, the plaintiff seeks to reverse that portion of the decree wherein the chancellor disallowed the claim of $1127.12 and asked the Appellate court to add said $1127.12 to the decree.

It appears that the decree that was entered by the court was entered on plaintiff's motion, and it would appear that the plaintiff cannot attempt to appeal from, assign error upon or "correct" a decree which plaintiff asked the trial court to enter, upon plaintiff's motion. In Newman v. Lick, 23 Ill. 338 at page 339, the court held that,

"Plaintiff, by voluntarily dismissing his suit, . . . waived any error the court below may have committed, in deciding the motion to dismiss . . . Nor has he any right to have the final judgment of the court dismissing the case reviewed, as that decision was made at his request and on his own motion."

Also in Posner v. Wechter, 276 Ill. App. 138, it would appear from the opinion that the court has passed on the very questions that are involved here upon the cross-appeal, in these words:

" * * * the undoubted general rule that a party who has induced the court to make an error or acquiesced in it when made, or requested that it be made, cannot be heard to assign error. There is no doubt these cases state the general rule in this respect."

Therefore, the court having passed upon the facts, it would not be of any particular benefit to repeat what we have already said with reference to the facts that are important in the decision of the appeal.

The real question in this controversy is whether the plaintiff has established by proper proof the payment by John Latoza of the amount of money which would justify approval of the Master's report finding that amount to be $1496.22.

From a careful examination of the facts that are in this record upon the question as to the moneys that were paid out by John Latoza, we find that the total that John Latoza advanced for the payment of the items that are the subject of this discussion is $713.56. This includes the following payments: Malkov Lumber Co., $131.48; Douglas Lumber Co., $120.49; J. E. Roth, $90.00; Harris Lumber Co., $5.76; North Side Sash & Door Co., $205.53; Chicago Building Material and Wrecking Co., $52.20; Bruno B. Sniegowski, $55.00; and Gordon Mfg. Co., $53.10; making a total of $713.56.

We believe that the finding that the balance of the items were paid by John Latoza is against the manifest weight of the evidence as pointed out hereinbefore.

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Also in Loeser v. Leather, 272 Ill. App. 128, it would appear from the opinion that the court has passed on the very questions that are involved here upon the cross-appeal, in these words:

" * * * the undoubted general rule that a party who has induced the court to make an error or acquiesced in it when made, or requested that it be made, cannot be heard to assign error. There is no doubt there cases state the general rule in this respect."

Therefore, the court having passed upon the facts, it would not be of any particular benefit to repeat what we have already said with reference to the facts that are important in the decision of the appeal.

The real question in this controversy is whether the plaintiff has established by proper proof the payment by John Latora of the amount of money which would justify approval of the Master's report finding that amount to be $1456.22.

From a careful examination of the facts that are in this record upon the question as to the moneys that were paid out by John Latora, we find that the total that John Latora advanced for the payment of the items that are the subject of this discussion is $713.58. This includes the following payments: Malkov Lumber Co., $131.48; Douglas Lumber Co., $120.49; J. . . Roth, $90.00; Harris Lumber Co., $5.78; North Side Sash & Door Co., $208.87; Chicago Building Material and Wrecking Co., $82.20; Bruno A. Smierowski, $5.00; and Gordon Mfg. Co., $55.10; making a total of $713.58.

We believe that the finding that the balance of the items were paid by John Latora is against the manifest weight of the evidence as pointed out hereinbefore.

The brief of the plaintiff, who is the appellee, contains cross-errors that are relied on by the plaintiff, contending that the court erred in finding that Jadviga Latoza was the equitable owner of the property in question and in not finding that Mona Himmelright was the equitable owner thereof. We find too that it is contended that the court erred in finding that the plaintiff as assignee of John Latoza was not entitled to have allowed as a part of her lien the additional sum of $1137.12 for the labor performed. The same brief, under the heading of points and authorities, set out as point three, suggests that a trustee is the owner of the property for the purpose of the Mechanic's Lien Act, and point four, that the court should have found that Mona Himmelright was the equitable owner of the property in question; again, under point five, that the court should have allowed plaintiff the additional sum of $1137.12 as a part of her lien for work and labor performed by John Latoza as a carpenter. It appears from the record that the appellant filed a motion that these portions of the brief be stricken on the ground that the appellee did not serve notice of cross-appeal. Appellant filed suggestions which with the motion were taken with the case. It appears from the record, first, that there is no evidence in the record, nor is there any finding in the decree, that Mona Himmelright ever made any claim of right or title in said property. She and possibly her creditors are the only persons who could claim such a right of ownership. The plaintiff did not contend that she was a creditor of Mona Himmelright, and in fact plaintiff did not even make Mona Himmelright a party to these proceedings. The evidence stressed by the plaintiff is that Jadviga Latoza borrowed $3500 from Mona Himmelright. If this was a loan then Mona Himmelright was a creditor and not an owner. Secondly, a written trust agreement was introduced in evidence that Jadviga Latoza was the owner of the property, and this was the finding in the decree. It is also undisputed evidence that both the plaintiff

The brief of the plaintiff, who is the appellee, contains cross-errors that are relied on by the plaintiff, contending that the court erred in finding that Ladvigs Latoxa was the equitable owner of the property in question and in not finding that Mona Himmelright was the equitable owner thereof. We find too that it is contended that the court erred in finding that the plaintiff as assignee of John Latoxa was not entitled to have allowed as a part of her lien the additional sum of $1127.12 for the labor performed. The same brief, under the heading of points and authorities, set out as point three, suggests that a trustee is the owner of the property for the purpose of the Mechanic's Lien Act, and point four, that the court should have found that Mona Himmelright was the equitable owner of the property in question; again, under point five, that the court should have allowed plaintiff the additional sum of $1127.12 as a part of her lien for work and labor performed by John Latoxa as a carpenter. It appears from the record that the appellant filed a motion that these portions of the brief be stricken on the ground that the appellee did not serve notice of cross-appeal. Appellant filed suggestions which with the motion were taken with the case. It appears from the record, first, that there is no evidence in the record, nor is there any finding in the decree, that Mona Himmelright ever made any claim of right or title in said property. She and possibly her creditors are the only persons who could claim such a right of ownership. The plaintiff did not contend that she was a creditor of Mona Himmelright, and in fact plaintiff did not even make Mona Himmelright a party to these proceedings. The evidence stressed by the plaintiff is that Ladvigs Latoxa borrowed $800 from Mona Himmelright. If this was a loan then Mona Himmelright was a creditor and not an owner. Secondly, a written trust agreement was introduced in evidence that Ladvigs Latoxa was the owner of the property, and this was the finding in the decree. It is also undisputed evidence that both the plaintiff

Bernice Paul and John Latoza, her assignor, knew that Jadviga Latoza was the owner of the property.

From the facts as they are called to our attention it appears that the Chancellor correctly found that Jadviga Latoza was the owner of the property in question and properly disallowed a mechanic's lien claim of $1137.12 for materials and services furnished to Jadviga Latoza by John Latoza, her husband, because of the provisions of section 8 of the Husband and Wife Act.

As we have stated, the Chancellor correctly found upon the questions which were called to his attention as indicated in the record, and therefore the said motions and suggestions are found to have been properly denied.

Under the circumstances we are of the opinion that the decree that was entered by the court for the amount of $1496.22 in this action was an erroneous one, and for that reason as we stated before we have reversed and set aside the decree with the direction that the cause be remanded for further consideration in view of the conclusion that was reached by this court; that the court enter a decree for the plaintiff allowing a mechanic's lien for $713.56.

For the reason stated the decree that is before this court is reversed and the cause is remanded for the trial court to take proper action in view of the conclusions that this court has reached upon the questions involved.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, J., CONCURS,

BURKE, P.J. SPECIALLY CONCURRING:-

The brief of plaintiff, who is the appellee, contains the following: "Cross errors relied on by plaintiff. The court erred in finding that Jadviga Latoza was the equitable owner of the property in question and in not finding that Mona Himmelright was the equitable owner thereof. The court erred in finding that plaintiff as assignee of John Latoza was not entitled to have allowed as a part of her lien

Bernice Paul and John Latoza, her assignor, knew that Ladyiga Latoza was the owner of the property.

From the facts as they are called to our attention it appears that the Chancellor correctly found that Ladyiga Latoza was the owner of the property in question and properly disallowed a mechanic's lien claim of $137.12 for materials and services furnished to Ladyiga Latoza by John Latoza, her husband, because of the provisions of section 8 of the Husband and Wife Act.

As we have stated, the Chancellor correctly found upon the questions which were called to his attention as indicated in the record, and therefore the said motions and suggestions are found to have been properly denied.

Under the circumstances we are of the opinion that the decree that was entered by the court for the amount of $498.22 in this action was an erroneous one, and for that reason as we stated before we have reversed and set aside the decree with the direction that the cause be remanded for further consideration in view of the conclusion that was reached by this court; that the court enter a decree for the plaintiff allowing a mechanic's lien for $72.86.

For the reason stated the decree that is before this court is reversed and the cause is remanded for the trial court to take proper action in view of the conclusions that this court has reached upon the questions involved.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER, J., CONCURS.

GURKIN, P.J., SPECIALLY CONCURRING: -

The brief of plaintiff, who is the appellee, contains the following: "Cross errors relied on by plaintiff. The court erred in finding that Ladyiga Latoza was the equitable owner of the property in question and in not finding that Mona Himmelright was the equitable owner thereof. The court erred in finding that plaintiff as assignee of John Latoza was not entitled to have allowed as a part of her lien

the additional sum of $1,137.12 for labor performed". The same brief under the heading of "Points and Authorities" sets out as point 3 that "a trustee is the owner of property for purposes of the Mechanic's Lien Act"; point 4 that "the court should have found that Mona Himmelright was the equitable owner of the property in question", and point 5 that "the court should have allowed plaintiff the additional sum of $1,137.12 as a part of her lien for work and labor performed by John Latoza as a carpenter". Appellant filed a motion that these portions of the brief be stricken on the ground that the appellee did not serve a "notice of cross appeal". Appellant filed counter suggestions. The motion and counter suggestions were taken with the case. Rule 35 of the Supreme Court provides that each appellee who desires to prosecute a cross-appeal from all or any part of the judgment or decree, shall, within ~~ten~~ 10 days after service of notice of appeal, serve a notice of such cross-appeal. Rule 39, entitled "Briefs", requires that "the concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal, or of the cross errors submitted by an appellee not prosecuting a cross appeal." This language indicates that the Supreme Court contemplated that in certain instances, an appellee not prosecuting a cross-appeal could nevertheless set out cross-errors in his brief. In Scribner v. Village of Downers Grove, 372 Ill. 614, 616, the Supreme Court held that where an appellee does not secure all of the relief he claimed in the trial court, it is necessary for him to file a cross-appeal. In Heine v. Degen, 362 Ill. 357, 380, the court held that "there seems to be no way provided for an appellee to appeal from a decree other than by cross appeal and none is needed." It therefore appears that in order to obtain affirmative relief, an appellee must file notice of cross-appeal as required by Rule 35.

I am of the opinion that cross-errors may be argued in the

the additional sum of $1,157.12 for labor performed". The same brief under the heading of "Points and Authorities" sets out as point 3 that "a trustee is the owner of property for purposes of the Mechanic's Lien Act"; point 4 that "the court should have found that Mona Himmelright was the equitable owner of the property in question"; and point 5 that "the court should have allowed plaintiff the additional sum of $1,157.12 as a part of her lien for work and labor performed by John Letosa as a carpenter". Appellant filed a motion that these portions of the brief be stricken on the ground that the appellee did not serve a "notice of cross appeal". Appellant filed counter suggestions. The motion and counter suggestions were taken with the case. Rule 35 of the Supreme Court provides that each appellee who desires to prosecute a cross-appeal from all or any part of the judgment or decree, shall, within ten days after service of notice of appeal, serve a notice of such cross-appeal. Rule 39, entitled "Briefs", requires that "the concluding subdivision of the statement of the case shall be a brief statement of the errors or cross-errors relied upon for a reversal, or of the cross errors submitted by an appellee not prosecuting a cross-appeal." This language indicates that the Supreme Court contemplated that in certain instances, an appellee not prosecuting a cross-appeal could nevertheless set out cross-errors in his brief. In Gerlmer v. Village of Downers Grove, 372 Ill. 614, 615, the Supreme Court held that where an appellee does not secure all of the relief he claimed in the trial court, it is necessary for him to file a cross-appeal. In Heine v. Deere, 362 Ill. 387, 390, the court held that "there seems to be no way provided for an appellee to appeal from a decree other than by cross appeal and none is needed." It therefore appears that in order to obtain affirmative relief, an appellee must file notice of cross-appeal as required by Rule 35.

I am of the opinion that cross-errors may be argued in the

absence of a notice of cross-appeal, where the appellee does not ask for affirmative relief. In People v. Bradford, 372 Ill. 63, 65, the court said:

"The People have filed a motion to strike the statement, brief and argument of appellees for the reason that they have argued the defenses stricken by the trial court, and urge that these cannot be considered, because appellees took no cross-appeal. They did assign cross errors. Moreover, it was unnecessary for appellees to cross-appeal in order to save for review all the defenses interposed in their answer. The judgment appealed from was for appellees, and no part of it was adverse to them. They were, therefore, in no position to prosecute a cross-appeal. Having obtained all the relief they deemed themselves entitled to, they may sustain the judgment upon any ground warranted by the record, though they may wish to show the court below erred in not giving it to them on the different or additional grounds."

There is also a class of cases where cross-errors are permitted to be argued for the purpose of having prejudicial errors against an appellee corrected upon a second trial, in case the judgment order or decree should be reversed. (Pelouge v. Slaughter, 241 Ill. 215, 224, 227.)

It is also interesting to note that Rule 39 of the Supreme Court requires that the concluding subdivision of the statement of a case "shall be a brief statement of the errors or cross errors relied upon, or of the cross errors submitted by an appellee not prosecuting a cross appeal." In an opinion filed in the recent case of Swain v. Hoberg, No. 26648, our Supreme Court considered a case appealed from the Appellate Court for the ~~2nd~~ Second District in which that court dismissed an appeal because the brief filed by the appellant did not contain a brief statement of the errors relied upon for reversal as the concluding subdivision of the statement of the case, as required by Rule 39. The Supreme Court, in reversing the judgment of the Appellate Court, with directions to overrule the motion to dismiss the appeal and to consider the case on its merits, said:

"To dismiss the appeal in all cases for failure to comply, strictly, with the rule, in this respect, is, in our opinion, too harsh a penalty to impose on litigants for infraction of the rule. Rules are made for the purpose of promoting justice and not for the entrapment of litigants. In a case where the failure to comply with the rule makes it impossible for the court to determine the issues or questions sought to be raised and the errors relied upon, a dismissal of the appeal, or writ of error, or an affirmance

absence of a notice of cross-appeal, where the appellee does not ask for affirmative relief. In People v. Wrighton, 272 Ill. 55, 55, the court said:

"The People have filed a motion to strike the statement, brief and argument of appellees for the reason that they have argued the defenses stricken by the trial court, and urge that these cannot be considered, because appellees took no cross-appeal. They did assign cross errors. However, it was unnecessary for appellees to cross-appeal in order to save for review all the defenses interposed in their answer. The judgment appealed from was for appellees, and no part of it was adverse to them. They were, therefore, in no position to prosecute a cross-appeal. Having obtained all the relief they desired themselves entitled to, they may sustain the judgment upon any ground warranted by the record, though they may wish to show the court below erred in not giving it to them on the different or additional grounds."

There is also a class of cases where cross-errors are permitted to be argued for the purpose of having prejudicial errors against an appellee corrected upon a second trial, in case the judgment order or decree should be reversed. (Pelouze v. Hawthorn, 241 Ill. 218, 224, 227.)

It is also interesting to note that rule 39 of the Supreme Court requires that the concluding subdivision of the statement of a case "shall be a brief statement of the errors or cross errors relied upon, or of the cross errors submitted by an appellee not prosecuting a cross appeal." In an opinion filed in the recent case of Swain v. Bohen, No. 23648, our Supreme Court considered a case appealed from the Appellate Court for the 2nd District in which that court dismissed an appeal because the brief filed by the appellant did not contain a brief statement of the errors relied upon for reversal as the concluding subdivision of the statement of the case, as required by rule 39. The Supreme Court, in reversing the judgment of the Appellate Court, with directions to overrule the motion to dismiss the appeal and to consider the case on its merits, said:

"To dismiss the appeal in all cases for failure to comply strictly, with the rule, in this respect, is, in our opinion, too harsh a penalty to impose on litigants for infraction of the rule. Rules are made for the purpose of promoting justice and not for the entrapment of litigants. In a case where the failure to comply with the rule makes it impossible for the court to determine the issues or questions sought to be raised and the errors relied upon, a dismissal of the appeal, or writ of error, or an affirmance

pro forma of the judgment sought to be reviewed would be justified." The rule of the 1st District of the Appellate Court requires that the appellant shall include in his brief "a short paragraph giving an outline of the plaintiff's theory of the case, followed by a short paragraph giving in like manner the theory of the defense," but does not require a brief statement of the errors or cross errors relied upon.

Applying the rules discussed to appellant's motion to strike parts of appellee's brief, I am of the opinion that cross-error No. 2 on page 3 that "the court erred in finding that plaintiff as assignee of John Latoza was not entitled to have allowed as a part of her lien the additional sum of $1,137.12 for labor performed," calls for affirmative relief, and that no notice of cross-appeal having been filed it should be stricken. Point 5 arguing this so-called cross-error should likewise be stricken. Point No. 1 of the cross-errors relied on by plaintiff that "the court erred in finding that Jadviga Latoza was the equitable owner of the property in question and in not finding that Mona Himmelright was the equitable owner thereof", and point No. 3 under Points and Authorities that "a trustee is the owner of property for purposes of the Mechanic's Lien", and point No. 4 that "the court should have found that Mona Himmelright was the equitable owner of the property in question," are not presented in support of an argument for affirmative relief, but are points which seek to sustain the decree and should not be stricken. For these reasons appellant's motion to strike point No. 2 on page 3 of appellee's brief and point No. 5 on page 5 of the same brief, should be allowed, and appellant's motion to strike point No. 1 on page 3 of appellee's brief, and points Nos. 3 and 4 on pages 4 and 5 of the same brief, should be denied.

pro forma of the judgment sought to be reviewed would be justified." The rule of the 1st District of the Appellate Court requires that the appellant shall indicate in his brief "a short paragraph giving an outline of the plaintiff's theory of the case, followed by a short paragraph giving in like manner the theory of the defense," but does not require a brief statement of the errors or cross errors relied upon.

Applying the rules discussed to appellant's motion to strike parts of appellee's brief, I am of the opinion that cross-error No. 2 on page 3 that "the court erred in finding that plaintiff as assignee of John Lotors was not entitled to have allowed as a part of her lien the additional sum of $1,157.12 for labor performed," calls for affirmative relief, and that no notice of cross-appeal having been filed it should be stricken. Point 3 arguing this so-called cross-error should likewise be stricken. Point No. 1 of the cross-errors relied on by plaintiff that "the court erred in finding that Jadviga Lotors was the equitable owner of the property in question and in not finding that Nona Himmelright was the equitable owner thereof", and point No. 3 under points and Authorities that "a trustee is the owner of property for purposes of the Mechanic's Lien", and point No. 4 that "the court should have found that Nona Himmelright was the equitable owner of the property in question," are not presented in support of an argument for affirmative relief, but are points which seek to sustain the decree and should not be stricken. For these reasons appellant's motion to strike point No. 2 on page 3 of appellee's brief and point No. 3 on page 3 of the same brief, should be allowed, and appellant's motion to strike point No. 1 on page 3 of appellee's brief, and points Nos. 3 and 4 on pages 4 and 5 of the same brief, should be denied.

41779

PERNICE PAUL, (Plaintiff) Appellee, v. CHARLES SHUKES, et al., (Defendants).	APPEAL FROM SUPERIOR COURT COOK COUNTY.
On Appeal of JOSEPH D. STEWART, (Defendant) Appellant.	

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT ON REHEARING.

The defendant Joseph D. Stewart filed his petition for rehearing, which was allowed and which the plaintiff answered.

After careful consideration of the record, abstracts, original briefs, petition and answer thereto, we will adhere to the opinion which was filed by this court for the reasons stated in the opinion that the decree entered by the trial court for the amount of $1496.22 in this action was an erroneous one; That the cause be reversed and remanded for further consideration, in view of the conclusion that was reached by this court, and that the trial court enter a decree for the plaintiff allowing a mechanic's lien of $713.56.

For the reasons stated in the opinion the cause will be reversed and remanded for the trial court to take proper action in view of the conclusion that this court has reached upon the questions involved.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, J., CONCURS,

BURKE, P.J., SPECIALLY CONCURRING.

4173

PERRIDE PULL,	
(Plaintiff), Appellee,	
v.	APPEAL FROM
CHARLES BROWER, et al.,	SUPERIOR COURT
(Defendants).	DODGE COUNTY.
On Appeal of JOSEPH D. STEWART,	
(Defendant), Appellant.	

MR. JUSTICE MERRY DELIVERED THE OPINION OF THE COURT ON REHEARING.

The defendant Joseph D. Stewart filed his petition for rehearing, which was allowed and which the plaintiff answered.

After careful consideration of the record, abstracts, original briefs, petition and answer thereto, we will adhere to the opinion which was filed by this court for the reasons stated in the opinion that the decree entered by the trial court for the amount of $1436.52 in this action was an erroneous one. That the cause be reversed and remanded for further consideration, in view of the conclusion that was reached by this court, and that the trial court enter a decree for the plaintiff allowing a mechanic's lien of $714.06.

For the reasons stated in the opinion the cause will be reversed and remanded for the trial court to take proper action in view of the conclusion that this court has reached upon the questions involved.

REVERSED AND REMANDED WITH DIRECTIONS.

KIRK, J., CONCURS.

BURKE, P.J., SPECIALLY CONCURRING.

41940

317 I.A. 650

JOHN WERNER,
Plaintiff and Counterdefendant,
Appellee,

v.

A. E. FLOSDORF,
Defendant and Counterclaimant,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was the inventor and sole owner of two United States and one Canadian patent covering improvements in certain methods with respect to transfer prints and secret formulas pertaining to the reproduction of designs and the like on wood, metallic and other surfaces. In the fall of 1935 he was introduced to defendant Flosdorf by the latter's friend, Thomas Barrett-Smith, who had told Flosdorf that the Werner patents were available and showed him some samples which plaintiff had brought from Europe and which "looked very good." Flosdorf became "tremendously interested" and in response to an inquiry whether the reproduction of designs under the patents could be made commercially profitable, plaintiff assured Flosdorf that they could; that such an enterprise would require about $100,000 capital with which to purchase special machinery and engage technical assistants and employees and acquire a suitable plant for manufacturing the products; and he also told Flosdorf that with the proposed capital investment "the business would make some money, *** the percentage would be twenty-five to thirty per cent, *** [and] he would make $25,000 to $30,000 per year." Flosdorf was at the time division manager of the Quaker Oats Company, had been connected with that concern for 35 years, and he thought it feasible by contacting some of his friends, showing them the process and explaining what little he knew about it, to raise sufficient funds for launching the enterprise. Accordingly, a written agreement was entered into, dated October 23, 1935, wherein plaintiff granted Flosdorf license privileges under his patents, and the latter in turn undertook to pay him during the

JOHN BRAMER, Plaintiff and Counterdefendant, appellee,	)))

life of the agreement a minimum annual royalty of $5,000, payable in quarterly installments on the first day of January, April, July and October of each year. Flosdorf obtained the required capital, and a corporation known as the Pandex Corporation was organized for manufacturing purposes. Plaintiff assumed the position of technical expert in the newly formed corporation, selected one Ricketts as his assistant, recommended the hiring of other help and purchased the necessary machinery. At the outset plaintiff received a salary of $60 a week, which after three or four months was raised to $100. The manufacturing plant of the corporation was at 25th and Dearborn streets, where plaintiff devoted his entire time to the business. In the early summer of 1937 the relationship of the parties terminated, and the following January plaintiff sued Flosdorf and the Pandex Corporation to recover $1,716.66 in royalties under the written agreement, together with interest at the rate of 5 per cent per annum. The Pandex Corporation was dismissed as a party defendant, and the suit thereafter proceeded against Flosdorf, who filed an answer and counterclaim based upon an alleged breach by plaintiff of either an implied warranty under the written contract or an express warranty made in a contemporaneous oral agreement, which is predicated on the representation that a product could be produced under plaintiff's patents, which could be sold on the market as a commercial article. Trial by jury resulted in verdicts finding the issues for plaintiff and assessing his damages at $2,000, and resolving the issues under the counterclaim adversely to Flosdorf. Defendant appeals from the judgment entered on the verdicts upon the principal ground that the evidence shows conclusively that no commercial article could be produced or sold on the open market by the use of plaintiff's patents; that by reason of the breach of warranty, either implied in the written contract or expressly made in the contemporaneous oral agreement, plaintiff was not entitled to recover; that defendant was damaged, as the result of the breach

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in a sum far in excess of the amount of plaintiff's claim; and that consequently the court should have granted defendant's motion for a new trial.

The alleged oral agreement, which Flosdorf described as being contemporaneous with the written agreement of the parties, is based upon conversations beginning about a month or more before the written contract was executed, and under the established rule usually applied in such circumstances a written contract supersedes all previous oral agreements and undertakings. This rule is well stated in 17 Corpus Juris Secundum 750, section 322, as follows: "Where preliminary negotiations are consummated by a written agreement, or an oral contract is evidenced by a subsequent agreed memorandum in writing, the writing supersedes all previous understandings, and the intent of the parties must be ascertained therefrom. *** Representations made during the negotiation of a contract which are not included in the final agreement are not part of it and are not binding." Lanum v. Harrington, 267 Ill. 57, and Adams v. Eisenstein, 248 Ill. App. 559, support the rule. The record clearly indicates that the statements of plaintiff, which Flosdorf claims constitute a warranty under an oral agreement were all made during the negotiations of the parties shortly after plaintiff was introduced to Flosdorf and before the formal written contract was entered into. Counsel for defendant concedes it to be the settled rule that a prior or contemporaneous oral agreement which contradicts, varies or otherwise modifies a written agreement between the same parties and pertaining to the same subject matter, is merged in the written agreement, but he argues and cites authorities purporting to hold that the inconsistencies and contradictions between the alleged oral agreement and the written undertaking take the case at bar outside the established rule. He takes the position that the written contract is a mere royalty agreement by which plaintiff granted defendant the exclusive license to manufacture under the Werner patents, and defendant agreed to pay plaintiff a certain specified sum for royalty; that, on the

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other hand, none of the things which defendant undertook to do under the oral agreement conflict with or supersede in any way the provisions of the written undertaking, for under the parol contract defendant was merely obligated to (a) form a corporation, (b) raise money to manufacture under plaintiff's patent, (c) place the manufacturing and other business under plaintiff's supervision, and (d) pay plaintiff a stipulated salary. However, all these undertakings on the part of defendant were merely inducements for acquiring the license under the written contract, and formed the basis for discussion as to the means by which the manufacture of articles under plaintiff's patents could be accomplished. The formation of a corporation, the raising of funds to purchase machinery and establish a plant, and the employment of plaintiff to supervise manufacture under the patents and process with which he was considered to be familiar, at a stipulated salary, were all essential to the enterprise by which defendant sought to commercialize the license which he was about to acquire from plaintiff, and for which he subsequently agreed to pay a royalty. Any promises that plaintiff may have orally made were not conditioned on defendant's agreement to pay such royalties, nor can they fairly be considered as concurrent obligations. The law is well settled that the failure of a licensor "to perform an independent covenant, while it may impose a liability upon him to respond in damages, will not prevent him from enforcing his claim for royalties." 48 Corpus Juris 280, section 459; Bowers' California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475. Therefore, even if there was a breach of the oral agreement, it would not constitute a defense to plaintiff's action for royalties under the written instrument.

The express warranty relied on under the oral agreement is predicated upon plaintiff's representation that articles could be manufactured or produced by the use of plaintiff's patents which would be capable of yielding substantial profits. No doubt

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plaintiff had sufficient faith in his patents to entertain this hope; but at best it was an expression of opinion as to future events and not a warranty. Such expressions in connection with negotiations and sales have come to be regarded as mere opinion and are generally characterized as "puffing," trade talks and statements of value or quality. Miller v. Young's Administrator, 33 Ill. 355. In Robinson v. Parks, 76 Md. 118, 24 Atl. 411, it was held that plaintiff was not entitled to recover on account of any representation made by defendants that the stock of the company in question would pay as much as 20 per cent in dividends, or for any other expression of opinion concerning the future value or profit of the business to be carried on, and that such representations by the defendants should be excluded as a basis of recovery. In Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, which is cited by defendant in support of the contention that the contemporaneous oral agreement was binding on the parties, the court said: "Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Exaggeration in the commendation of articles offered for sale will not avoid a contract. However reprehensible their conduct may be in morals, the law does not hold parties responsible for the truth or falsity of expressions of opinion as to the merits of an article offered for sale, or as to its value, where no special confidence is reposed." Defendant stresses the fact that he had scant knowledge of the process by which the contemplated articles were to be made under plaintiff's patents, and therefore relied on plaintiff's statements and his expert knowledge of the patents and process in question. It appears from the evidence, however, that prior to 1935 defendant knew of the Werner patents through one Albers of Cincinnati, Ohio, with whom defendant was well acquainted. Albers had in 1933 or 1934 manufactured articles under plaintiff's process, and if defendant did not ascertain from him the feasibility of the process for commercial use, he certainly had the opportunity to do so. In

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any event, there is no basis for the contention that defendant reposed special confidence in plaintiff, or that a confidential relationship existed between the parties.

It is urged that a warranty of commercial utility is implied from the fact that the written contract provides that defendant shall manufacture for commercial use, and that he is to pay percentage royalties on a sliding scale upon sales. Whether an implied agreement is to be read into a written instrument depends on the intention of the parties. The provision that defendant could cancel the license on six months' notice without a corresponding privilege in plaintiff, was obviously inserted to protect and relieve defendant in the event the product and its manufacture should prove commercially unprofitable. The exclusive license given defendant under the agreement prevented plaintiff from otherwise dealing with his patent rights so long as defendant retained the license, and during the existence of the agreement defendant was obliged to pay plaintiff the minimum royalties provided in the contract. In Ridsdale Ellis' Treatise on the Law of Patent Assignments and Licenses (p. 443, sec. 392), the author states the rule that there is no implied warranty of commercial utility, and in support thereof cites Van Norman v. Barbeau, 54 Minn. 388, 55 N. W. 1112, wherein the court said: "The rule applicable to a defense of want of consideration in a contract for a license to manufacture and sell articles under a patent right is thus stated in Wilson v. Hentges, 26 Minn. 290, 3 N. W. Rep. 338: 'If the patent be valid, the right to sell the article is exclusive, and is, in law, a valuable right, although it may not, in fact, be a profitable one; and, as one may pay or agree to pay what he pleases for such a right, the grant of it to him is a valid consideration for his promise to pay for it. When, therefore, it is sought to impeach a contract as without consideration, on the ground that the consideration was the grant of a right to sell a patented article, and that the article is useless,

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it must be shown that it is useless in the sense that will avoid the patent.' And it is not enough that its practical utility be very limited, or that it will be of little or no profit to the inventor. 'The law does not look to the degree of utility. It simply requires that it should be capable of use, and that the use be such as sound morals and policy do not discountenance or prohibit." There are cases (arising under the Illinois Sales Act, Ill. Rev. Stat. 1941, ch. 121-1/2, sec. 15, subsec. (1),) where the buyer expressly or by implication makes known to the seller the purpose for which the goods are required and where the buyer expressly relies on the seller's skill and judgment. Under such circumstances courts have held that there is an implied warranty that the goods shall be reasonably fit for such purpose. Lathrop-Paulsen Co. v. Perksen, 229 Ill. App. 400. However, those cases have no application to a situation where a license is given to manufacture generally under a patented process.

Considerable space is devoted by the respective parties in their briefs to the question whether the evidence discloses that a commercial product was manufactured under plaintiff's patents. Defendant argues that the verdicts are contrary to the manifest weight of the evidence, whereas plaintiff insists that there is sufficient evidence in the record to support the verdicts in plaintiff's favor. In view of our conclusion that no express or implied warranties existed under either the oral or written contract, the factual questions are of secondary consideration. There is evidence that commercial articles were manufactured and sold to several concerns during the time that defendant operated this business, and all this proof was submitted for the jury's consideration.

We are of opinion that the trial court properly overruled defendant's motion for a new trial, and the judgment entered herein is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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We are of opinion that the trial court properly overruled defendant's motion for a new trial, and the judgment entered herein is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

41549

317 I.A. 651

PAUL KOEPKE, as administrator of the estate of Joseph T. Baldwin, deceased, Appellant,	APPEAL FROM
v.	CIRCUIT COURT,
MATTHEWS BROTHERS CONSTRUCTION CO., a corporation, Appellee.	COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought under the Injuries Act by Paul Koepke, as administrator of the estate of Joseph T. Baldwin, deceased, against the defendant, Matthews Brothers Construction Co., to recover damages sustained by the widow and minor children of said Joseph T. Baldwin because of his death, which occurred on September 21, 1937 as a result of injuries sustained by him on the same date. At the close of plaintiff's case the trial court denied defendant's motion for a directed verdict and at the close of all the evidence offered by both parties the court reserved its ruling on defendant's motion for a directed verdict. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at $6,000. On defendant's motion judgment was entered in its favor notwithstanding the verdict. Plaintiff appeals from this judgment.

Plaintiff's complaint alleged substantially that defendant was in possession, control of and operating a crane or dragline at a certain location in Chicago and was using the dragline in excavating a sewer trench and in placing sewer pipe therein; that "plaintiff's intestate *** was employed by the United States Government in and about said crane *** as said crane was being used by the defendant in the putting in of said sewer in said street;" that he was in the exercise of due care and caution for his own safety; that in endeavoring to move a trailer loaded with sewer pipe the defendant was negligent in the following respects: (1) in attempting to move the trailer in question loaded with the concrete sewer pipe when in the exercise of

PAUL KOPKE, as administrator of the estate of Joseph F. Baldwin, deceased,	)	
Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
MATTHEWS BROTHERS CONSTRUCTION CO., a corporation,	)	COOK COUNTY.
Appellee.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought under the Injuries Act by Paul Kopke, as administrator of the estate of Joseph F. Baldwin, deceased, against the defendant, Matthews Brothers Construction Co., to recover damages sustained by the widow and minor children of said Joseph F. Baldwin because of his death, which occurred on September 21, 1937 as a result of injuries sustained by him on the same date. At the close of plaintiff's case the trial court denied defendant's motion for a directed verdict and at the close of all the evidence offered by both parties the court reserved its ruling on defendant's motion for a directed verdict. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at $6,000. On defendant's motion judgment was entered in its favor notwithstanding the verdict. Plaintiff appeals from this judgment.

Plaintiff's complaint alleged substantially that defendant was in possession, control of and operating a crane or dragline at a certain location in Chicago and was using the dragline in excavating a sewer trench and in placing sewer pipe therein; that "plaintiff's intestate *** was employed by the United States Government in and about said crane *** as said crane was being used by the defendant in the putting in of said sewer in said street;" that he was in the exercise of due care and caution for his own safety; that in endeavoring to move a trailer loaded with sewer pipe the defendant was negligent in the following respects: (1) in attempting to move the trailer in question loaded with the concrete sewer pipe when in the exercise of

ordinary care it should have known that said trailer and load was of such great weight that it was dangerous to attempt to move it by the use of said crane or dragline, (2) in attempting to move said trailer sidewise by revolving said crane, (3) in attempting to move said trailer by swinging the boom without warning while plaintiff's intestate was standing nearby and (4) in attempting to move the trailer by revolving said crane when it knew or in the exercise of ordinary care ought to have known that the crane or boom was not constructed or designed to take lateral stress; and that as a result of such negligence the boom of said dragline buckled and collapsed, striking the decedent and fatally injuring him.

Defendant's answer denied all the material allegations of the complaint, including the allegation that it was at the time in question in possession, control of and operating the aforesaid dragline.

The United States Treasury Department through the Works Progress Administration was engaged in a government project in the vicinity of 107th street and Hamlin avenue and at the time the accident involved herein occurred it was engaged in digging a trench 16 feet deep in the center of 107th street near Hamlin avenue and laying sewer pipe therein. In connection with this project the Treasury Department entered into a written contract with defendant for the rental or use of its dragline and the operator and oiler thereof.

The rental contract contained the following, among other provisions:

"Item No.	Description	Number of Units	Unit	Unit Price	Amount
"21-1-(A)	Rental Dragline: Including maintenance and repairs but not including operator, or oiler *** to be rented for a period of one (1) month commencing on date of delivery	1 Unit For 1 Mo.	Per Mo.	1750.00	1750.00

ordinary care it should have known that said trailer and load was of such great weight that it was dangerous to attempt to move it by the use of said crane or dragline, (2) in attempting to move said trailer sidewise by revolving said crane, (3) in attempting to move said trailer by swinging the boom without warning while plaintiff's intestate was standing nearby and (4) in attempting to move the trailer by revolving said crane when it knew or in the exercise of ordinary care ought to have known that the crane or boom was not constructed or designed to take lateral stress; and that as a result of such negligence the boom of said dragline buckled and collapsed, striking the decedent and fatally injuring him.

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The rental contract contained the following, among other provisions:

"Item No.	Description	Number of Units	Unit	Unit Price	Amount
"21-1-(A)	Rental Dragline: Including [illegible] maintenance and repairs but not including operator, or oiler *** to be rented for a period of one (1) month commencing on date of delivery	1 Unit For 1 Mo.	Per Mo.	1750.00	1750.00

	acceptance				
"21-1-(B)	Operator rental only, including wages for operator, insurance, etc., for 176 hours over the period covered above on Item 21-1-(A) ***.	Operator Rental On Above For 176 Hours	Per Hour	2.00	352.00
"21-1-(C)	Oiler rental only, including wages for oiler, insurance, etc., for 176 hours over the period covered on Item 21-1-(A) ***.	Oiler Rental On Above For 176 Hrs.	Per Hr.	1.25	220.00

"Proposed use: Excavate sewer trench."

The rental contract further provided that the "use" period would be for a minimum of one month and a maximum of three months. It also provided that "all licenses, permits, maintenance, repairs, etc., necessary for all operations of the equipment shall be furnished and paid for by the bidder and cost thereof included in the monthly unit price of the bid as quoted under Sub-item (a) Rental of Equipment ***." As already indicated the written contract included the "rental" of the operator and oiler as well as the dragline, the defendant, however, to pay their wages and to pay for their insurance coverage.

The dragline consisted of a caterpillar tractor equipped with a boom or crane and a shovel and other appurtenances. While defendant's dragline was engaged in digging the trench on 107th street, some distance east of Hamlin avenue, it was reported to the W.P.A. foreman in charge of the project that the rear end of a trailer loaded with concrete sewer pipe to be used on the job west of Hamlin avenue had slipped into the ditch on the north side of 107th street as it turned west into said 107th street from Hamlin avenue. The tractor to which the trailer was attached was unable to pull it out of the ditch. Thereupon Peter Savaiano, the W. P. A. foreman, asked Berger, the operator of the dragline, if he could get the trailer out of the ditch and Berger said "Yes, let us try to get it out." Berger then moved the dragline into

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position to attempt to lift the trailer out of the ditch. The boom or crane portion of the dragline was about 70 feet long and hanging on pulleys from the extreme end thereof were chains or cables to which was attached a large metal bucket. W. P. A. workmen attached chains from a hook on the bottom of the bucket to the trailer. In his first two attempts to lift the trailer with the boom Berger only succeeded in raising it a short distance from the ground. When it was so raised it "dragged over" or "moved to the side." In his third attempt to lift the trailer the boom buckled and collapsed, striking the decedent before he could get out of its way and fatally injuring him. Baldwin, the decedent, was employed on the project by the W. P. A. and it was his duty to check in all materials delivered to the job.

The maximum lifting capacity of the boom or crane was from 10,000 to 12,000 pounds and the load which the crane operator attempted to lift consisted of several lengths of concrete sewer pipe weighing 21,000 pounds, which were on the trailer, plus the weight of the trailer itself. The type of crane involved was designed for a vertical lift only and not for a "side pull."

We think that there was ample evidence to warrant the jury in finding that plaintiff was free from contributory negligence and that the proximate cause of decedent's fatal injuries was the negligence of the operator of the crane.

Defendant's position as stated in its brief is that "the undisputed evidence in the case shows that the dragline in question, together with the operator and oiler, had been leased or rented by the defendant to the Works Progress Administration and at the time of the accident said operator was acting as the servant of the Works Progress Administration and not of the defendant;" that "the work being done at the time of the happening of the accident in question was the work of the Works Progress Administration;" and that "the contract or lease between the Works Progress Administration and Matthews Brothers Construction Co.,

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being in writing, its construction is one of law for the court."

Plaintiff's theory as to this aspect of the case is that the operator of the crane was acting as the servant and agent of the defendant at the time of the accident.

While the principal reason stated by the trial judge for entering the judgment notwithstanding the verdict was that he concluded as a matter of law that the operator of the crane was acting as the servant of the W. P. A. and was engaged in W. P. A. work when the accident occurred and, while the argument in the briefs of the parties and the numerous authorities cited therein are directed primarily to the question as to whether the operator of the crane was the servant of defendant or of the W. P. A., we deem it unnecessary to consider or determine the said question, since, even though Berger was the servant of defendant while he operated the crane in connection with the sewer work, his attempt to lift the trailer out of the ditch was outside the scope of his employment.

It was unquestionably intended by the W. P. A. and the defendant that the latter's dragline was to be used solely to "excavate [a] sewer trench" and it was so provided in the written contract for the rental of said dragline by the W. P. A. The specifications of the rental contract provided for a dragline with a lifting capacity suitable for excavating the sewer trench and lifting the concrete pipes one at a time and placing them in said trench. The evidence discloses that the crane had a lifting capacity of from 10,000 to 12,000 pounds which was more than sufficient for its use in connection with the sewer work. But it was diverted to a use never contemplated by the rental contract, viz: to remove from the ditch the trailer loaded with concrete sewer pipe which weighed more than twice the lifting capacity of the crane.

If, as held by the trial court, the operator of the crane was the servant of the W. P. A. and subject to its control and

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If, as held by the trial court, the operator of the crane was the servant of the W. P. A. and subject to its control and

direction under the terms of the written contract and the W. P. A. foreman directed the operator of the crane to remove the trailer from the ditch or to attempt to do so, then of course, the defendant could not be held liable. If on the other hand it be assumed that, although the operator of the crane who was in the general employment of defendant was loaned to the W. P. A. under the terms of the written rental contract but did not become wholly subject to the latter's control and direction and that he continued to be the servant of defendant, his original master, in his operation of the crane in connection with the excavation of the sewer trench, still no liability would attach to defendant. Whether the operator of the crane voluntarily diverted the use thereof from the excavation of the sewer trench to the removal or attempted removal of the loaded trailer from the ditch or whether he complied with the directions of the W. P. A. foreman to so divert the use of the crane, defendant could not be held liable because said crane operator in so diverting the use of the crane was acting entirely outside the scope of his employment by defendant and outside of and beyond the "use" for which the crane was rented.

The judgment entered by the trial court in favor of defendant notwithstanding the verdict was proper.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

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317 I.A. 652

LOOP DISCOUNT CORPORATION, a corporation, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
HOLLEB & COMPANY, a corporation, Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Loop Discount Corporation, to recover damages from defendant, Holleb & Company, for the alleged wrongful conversion by the latter of certain goods, wares, merchandise and fixtures claimed to be the property of plaintiff under a chattel mortgage dated November 14, 1939. The case was tried by the court without a jury. Defendant was found guilty and plaintiff's damages were assessed at $1,000. Judgment against defendant for $1,000 was entered on such finding. Defendant appeals.

One Nathan Stein was the owner of a grocery store at 1448 Morse avenue, Chicago, Illinois. On November 14, 1939 Stein executed and delivered to plaintiff his note for $1,000 and a chattel mortgage securing same, which mortgage covered all the merchandise, fixtures and equipment in his store. This chattel mortgage was duly recorded and was a first and paramount lien on said merchandise, fixtures and equipment. Thereafter on November 22, 1939 Stein executed a chattel mortgage to the defendant, Holleb & Company, on the same property covered by the prior mortgage to plaintiff, to secure an indebtedness of $1,555.38 for goods purchased and received from the defendant company, which was engaged in the wholesale grocery business. Stein made payments from time to time on his indebtedness to the Loop Discount Corporation so that on August 14, 1940, the balance due on such indebtedness was $575. On August 14, 1940 Stein went to plaintiff's office and made

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a request for an additional loan. Two witnesses testified as to what occurred at that time, Jerome W. Rosefield, the general manager and authorized agent of the Loop Discount Corporation, in behalf of plaintiff and Stein in defendant's behalf.

The testimony of Jerome W. Rosefield was as follows:

"Q. Will you tell us exactly what he [Stein] said to you, and what you said to him; just give us the conversation?

"A. He wanted additional money to raise the mortgage back to a thousand dollars. I asked him if he has got any other claims or liens against him, and he said, 'No.' I made out a new mortgage for a thousand dollars, and he asked me, 'How about the old papers?' I said to him, 'You say there are no claims or liens against you. I have got to go away now, and I cannot check up on that. If there are no other claims or liens, I will release the old mortgage.' I said, 'If you say there are no claims or liens, when I return from my vacation, I will cancel the old papers and give you the release on them.'

"Q. Was there any conversation as to what would happen if there were claims or liens? A. Yes. Then the old mortgage would stand and the additional money would go against the old mortgage.

"Q. And you would do what with the new mortgage? A. We would have to cancel that.

"Q. Did you ever cancel the original mortgage? A. No, sir, I did not.

"Q. Did you cancel the note or the mortgage? A. No, sir.

"Q. Did you issue a release of the prior chattel mortgage? A. No, I did not.

Q. Did you investigate after you returned from your vacation? A. I did not get a chance to investigate, because the Holleb & Co., had taken possession of the store.

"THE COURT: Q. How many checks did you issue to him? A. Two checks.

"Q. What were the amounts of the checks? A. One was for three hundred dollars [$295.12], and the other one was for seven hundred dollars [$704.88].

"Q. Three hundred dollars was delivered to him? A. Yes.

"Q. And seven hundred dollars was delivered to your company? A. Yes.

"Q. Did he endorse the check? A. Yes.

"Q. Seven hundred dollars was the balance? A. Yes.

"Q. What did you do with that check after you got it? A. We deposited it in the suspense account, in our bank.

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"Q. About the same date you issued the check? A. Yes.

"Q. You credited it on your books as payment against the account? A. I put it in the suspense account, pending this investigation, because I had to leave town.

"Q. You did put the check in your account, and your bank deposited it to your credit, to the credit of the Loop Discount Corporation? A. Yes."

The pertinent portions of Nathan Stein's testimony follow:

"Q. What did you say to Mr. Rosefield, and what did he say to you? A. He asked me about the money, to pay the notes, and I told him I haven't got any money, and I would like to extend the note and give me the balance, whatever was due, $575.00, on the old mortgage. He said he would rather put a new mortgage.

"Q. $575 was due on Plaintiff's [original note and chattel mortgage] ***? A. Yes.

"Q. Go ahead. A. He told me he will make a new mortgage on it for a thousand dollars. He paid off the old one, and gave me $290 to make the thousand dollars. He told me he will mail me the other note in a couple of days.

"Q. Did you have any other conversation with him that day? A. That day, he told me that he is going to check up on it, and after that he is going to send me the old mortgage back.

"Q. Isn't it a fact that Mr. Rosefield asked you if there were any other claims or liens against you? A. Any executions on me, and he said he will check it up, and send the notes back.

"Q. He told you, if there were any executions - A. - He didn't tell me. I told him. He asked me if there were any executions, and I said, 'No.'

"Q. He said, 'If there are no executions, I will send you the papers?' A. He said, in a couple of days he will send it.

"Q. Isn't it a fact that he also asked you if there were any additional mortgages? A. He did not ask me that.

"MR. SLOTNIKOFF: Q. You did not tell him you had any other mortgages against you at that time? A. He did not ask me, and I did not tell him.

"Q. Isn't it a fact that he asked you whether or not there were any other claims against you? A. He did not ask me anything, but about executions.

"Q. He said he would check up and send you the papers if everything cleared up? A. Yes.

"Q. And if it didn't clear up, he would send you the new papers? A. He said he would send the papers in a couple of days."

On August 21, 1940, Holleb & Company, under its chattel mortgage of November 22, 1939, took possession of and commenced foreclosure proceedings against all the merchandise, goods and

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"Q. Isn't it a fact that he also asked you if there were any additional mortgages? A. He did not ask me that.

"MR. BLOCHNIKOFF: Q. You did not tell him you had any other mortgages against you at that time? A. He did not ask me, and I did not tell him.

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"Q. He said he would check up and send you the papers if everything cleared up? A. Yes.

"Q. And if it didn't clear up, he would send you the new papers? A. He said he would send the papers in a couple of days."

On August 21, 1940, Hollib & Company, under its chattel mortgage of November 22, 1939, took possession of and commenced foreclosure proceedings against all the merchandise, goods and

and fixtures in Stein's store, which as heretofore shown was the same property covered by all three of the chattel mortgages heretofore referred to. This was the situation which confronted Rosefield upon his return to Chicago and in behalf of plaintiff he immediately made demand upon defendant to turn over the mortgaged property. This demand was refused and the Loop Discount Corporation thereupon also took possession of the property and instituted foreclosure proceedings against same.

On August 29, 1940 while both mortgagees were in possession of the property they entered into a written stipulation the pertinent portions of which are as follows:

"THIS AGREEMENT Made this 29th day of August, 1940, by and between Holleb & Co., a corporation, hereinafter called the First Party, and the Loop Discount Corporation, a corporation, hereinafter called the Second Party, WITNESSETH:

"WHEREAS there has arisen a dispute as to the priority of certain chattel mortgages owned by the First Party and the Second Party covering the goods, wares, chattels, merchandise, etc., in the premises commonly known and designated as 1448 Morse Avenue, Chicago, Illinois, and

"WHEREAS, the parties hereto have both instituted chattel mortgage foreclosure proceedings against one Nathan Stein, the Mortgagor in the said mortgages; and both parties having taken possession of the said mortgaged premises by and through their respective agents and custodians; and

"WHEREAS, each of the parties hereto claim that their respective mortgages are prior and paramount to the others mortgage; and

"WHEREAS, the First Party has already posted the necessary chattel mortgage foreclosure notices and held a sale thereunder on the 28th day of August, 1940; and the chattel mortgage foreclosure sale of the Second Party has not yet been held because notice thereof was posted for said sale to be held at 10:00 o'clock in the forenoon on the 30th day of August, 1940; and

"WHEREAS, the First Party has and does represent to the Second Party that it is equipped and can obtain buyers and purchasers of the mortgaged goods, wares, chattels and merchandise covered in said mortgage at a high and advantageous price, and

"WHEREAS, it is the desire of the First Party to have the Second Party relinquish its possession and custody of the said goods, wares, merchandise and chattels and to recall and withdraw from the possession thereof the agents and custodian of the Second Party so that a sale of said goods, wares, merchandise and chattels can be made by the First Party, and

"WHEREAS, it is the desire of both parties hereto to maintain their full rights without any prejudice thereto whatever, and

and fixtures in Stein's store, which as heretofore shown was the same property covered by all three of the chattel mortgages heretofore referred to. This was the situation which confronted Rosefield upon his return to Chicago and in behalf of plaintiff he immediately made demand upon defendant to turn over the mortgaged property. This demand was refused and the Loop Discount Corporation thereupon also took possession of the property and instituted foreclosure proceedings against same.

On August 29, 1940 while both mortgagees were in possession of the property they entered into a written stipulation the pertinent portions of which are as follows:

"THIS AGREEMENT made this 29th day of August, 1940, by and between Hollob & Co., a corporation, hereinafter called the First Party, and the Loop Discount Corporation, a corporation, hereinafter called the Second Party, WITNESSETH:

"WHEREAS there has arisen a dispute as to the priority of certain chattel mortgages owned by the First Party and the Second Party covering the goods, wares, chattels, merchandise, etc., in the premises commonly known and designated as 1448 Morse Avenue, Chicago, Illinois, and

"WHEREAS, the parties hereto have both instituted chattel mortgage foreclosure proceedings against one Nathan Stein, the mortgagor in the said mortgages; and both parties having taken possession of the said mortgaged premises by and through their respective agents and custodians; and

"WHEREAS, each of the parties hereto claim that their respective mortgages are prior and paramount to the other mortgage; and

"WHEREAS, the First Party has already posted the necessary chattel mortgage foreclosure notices and held a sale thereunder on the 20th day of August, 1940; and the chattel mortgage foreclosure sale of the Second Party has not yet been held because notice thereof was posted for said sale to be held at 10:00 o'clock in the forenoon on the 30th day of August, 1940; and

"WHEREAS, the First Party has and does represent to the Second Party that it is equipped and can obtain buyers and purchasers of the mortgaged goods, wares, chattels and merchandise covered in said mortgage at a high and advantageous price, and

"WHEREAS, it is the desire of the First Party to have the Second Party relinquish its possession and custody of the said goods, wares, merchandise and chattels and to recall and withdraw from the possession thereof the agents and custodian of the Second Party so that a sale of said goods, wares, merchandise and chattels can be made by the First Party, and

"WHEREAS, it is the desire of both parties hereto to maintain their full rights without any prejudice thereto whatever, and

"WHEREAS, it is the desire of the parties hereto to litigate their dispute so that a Court of competent jurisdiction could adjudicate which of the mortgages is paramount or prior to the other,

"NOW, THEREFORE, for and in consideration of the sum of $1.00 and other good and valuable considerations passed from each of the parties hereto to the other, the receipt whereof is hereby acknowledged and for the further consideration of the exchange of mutual promises, agreements, covenants and undertakings of each of the parties hereto, the parties hereto agree as follows:

"(1) That the Second party shall institute a suit in the Municipal Court of Chicago against the First Party for the conversion of the certain personal property, goods, wares, chattels and merchandise above mentioned, in which suit the said Second Party will claim and allege, but which First Party denies that there is in its possession and that it is the owner of a mortgage which is paramount and prior to the mortgage of the First Party, and that since the said First Party took possession of, foreclosed and sold the said goods, wares, chattels and merchandise, that the said First Party is thereby guilty of conversion; and that the First Party shall immediately upon the filing of such suit cause its appearance to be entered in said suit, and to have the said suit set for trial on an early date.

"(2) That all the rights now possessed by the parties hereto shall in no way be prejudiced by this Agreement.

"(3) That the First Party may dispose of all of the goods, wares, merchandise and chattels hereinabove mentioned for the sum of One Thousand Dollars ($1,000.00) or more without the consent of the Second Party, and that the said $1,000.00, but not the over plus, if any, shall be deposited with Joseph L. Gill, Clerk of the Municipal Court of Chicago, until the final disposition of the said suit, and if judgment is rendered for and on behalf of the Second Party and against the First Party hereto, then the said Joseph L. Gill, Clerk of the Municipal Court of Chicago shall thereupon pay and deliver to the said Second Party or to its attorney, the said sum of One Thousand Dollars ($1,000.00); if, however, the said goods, wares, merchandise and chattels cannot be sold and disposed of for $1,000.00 or more, then said goods, wares, chattels and merchandise shall not be sold for any sum of money less than $1,000.00 except with the written consent of the Second Party, and if such sale is made, then such sum shall be deposited with Joseph L. Gill, Clerk of the Municipal Court of Chicago to remain until the final disposition of said suit, and shall be paid as herein stated.

"***

"(5) The only question to be determined in the said Court is the priority or superiority of the certain chattel mortgages now held and owned by the parties hereto. The measure of damages in the event that judgment is rendered in favor of the Second Party hereto and against the First Party hereto shall be the amount of money realized from the said Sale, up to the amount of $1,000.00, or as hereinabove mentioned, and the parties hereto shall agree that the Court may enter a judgment in said suit for such sum.

"(6) In the event that such suit is determined in favor of First Party and against Second Party, the parties hereto shall agree that judgment ~~only~~ for the appearance fee only may be

"WHEREAS, it is the desire of the parties hereto to litigate their dispute so that a Court of competent jurisdiction could adjudicate which of the mortgages is paramount or prior to the other,

"NOW, THEREFORE, for and in consideration of the sum of $1.00 and other good and valuable considerations passed from each of the parties hereto to the other, the receipt whereof is hereby acknowledged and for the further consideration of the exchange of mutual promises, agreements, covenants and undertakings of each of the parties hereto, the parties hereto agree as follows:

"(1) That the Second party shall institute a suit in the Municipal Court of Chicago against the First Party for the conversion of the certain personal property, goods, wares, chattels and merchandise above mentioned, in which suit the said Second Party will claim and allege, but which First Party denies that there is in its possession and that it is the owner of a mortgage which is paramount and prior to the mortgage of the First Party, and that since the said First Party took possession of, foreclosed and sold the said goods, wares, chattels and merchandise, that the said First Party is thereby guilty of conversion; and that the First Party shall immediately upon the filing of such suit cause its appearance to be entered in said suit, and to have the said suit set for trial on an early date.

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"(5) The only question to be determined in the said Court is the priority or superiority of the certain chattel mortgages now held and owned by the parties hereto. The measure of damages in the event that judgment is rendered in favor of the Second Party hereto and against the First Party hereto shall be the amount of money realized from the said Sale, up to the amount of $1,000.00, or as hereinabove mentioned, and the parties hereto shall agree that the Court may enter a judgment in said suit for such sum.

"(6) In the event that such suit is determined in favor of First Party and against Second Party, the parties hereto shall agree that judgment ~~sum~~ for the appearance fee only may be

entered in said suit, and that no money judgment for damages whatever shall be rendered for the First Party and against the Second Party in said suit. The judgment for the appearance fee will be satisfied in open court.

"(7) That each of the parties hereto hereby mutually forever releases, relinquishes and discharges the other party hereto from any and all liability for damages, claims for damages, losses, expenses and costs as a result of the action or possession that either of the parties has heretofore taken against the said mortgaged property or against the other party hereto.

"(8) That if the aforementioned cause in the Municipal Court of Chicago is adjudicated in favor of the Second Party, the Second Party will accept in full payment, satisfaction and release as against First Party of any and all judgments, including court costs, attorney's fees, interest, cost and other charges, the sum hereinabove referred to as a sum to be realized out of the sale of said personal property, goods, wares, chattels and merchandise which is deposited with the Clerk of the Municipal Court of Chicago as aforesaid."

Upon the trial plaintiff canceled the note and released the chattel mortgage which was executed by Stein and delivered to the Loop Discount Corporation on August 14, 1940. Defendant sold the mortgaged property for $1,300 but did not deposit with the Clerk of the Municipal court $1,000 as required by the aforesaid stipulation, which amount defendant agreed to pay plaintiff out of the proceeds of the sale as damages in the event the latter prevailed in this action.

Defendant's theory as stated in its brief is that "its chattel mortgage, dated November 22, 1939, became entitled to seniority by reason of the satisfaction of plaintiff's note and mortgage, dated November 14, 1939, through the execution, delivery and recordation of the new note and mortgage dated August 14, 1940, and the delivery of a check to the plaintiff for the unpaid balance of its first mortgage; that on said date a new mortgage was unconditionally delivered to the plaintiff, and that the parties intended, and the law conclusively presumes, a satisfaction and discharge of the mortgage of November 14, 1939. The defendant's further theory is that the judgment is inconsistent with the proper marshalling of the debtor's assets as required by law. The defendant's further theory is that the stipulation of counsel introduced into evidence *** was misconstrued as to the intent of the parties and even if

entered in said suit, and that no money judgment for damages whatever shall be rendered for the First Party and against the Second Party in said suit. The judgment for the appearance fee will be satisfied in open court.

"(7) That each of the parties hereto hereby mutually forever releases, relinquishes and discharges the other party hereto from any and all liability for damages, claims for damages, losses, expenses and costs as a result of the action or possession that either of the parties has heretofore taken against the said mortgaged property or against the other party hereto.

"(8) That if the aforementioned cause in the Municipal Court of Chicago is adjudicated in favor of the Second Party, the Second Party will accept in full payment, satisfaction and release as against First Party of any and all judgments, including court costs, attorney's fees, interest, cost and other charges, the sum hereinabove referred to as a sum to be realized out of the sale of said personal property, goods, wares, chattels and merchandise which is deposited with the Clerk of the Municipal Court of Chicago as aforesaid."

Upon the trial plaintiff cancelled the note and released the chattel mortgage which was executed by Stein and delivered to the Loop Discount Corporation on August 14, 1940. Defendant sold the mortgaged property for $1,300 but did not deposit with the Clerk of the Municipal court $1,000 as required by the aforesaid stipulation, which amount defendant agreed to pay plaintiff out of the proceeds of the sale as damages in the event the latter prevailed in this action.

Defendant's theory as stated in its brief is that "its chattel mortgage, dated November 22, 1939, became entitled to seniority by reason of the satisfaction of plaintiff's note and mortgage, dated November 14, 1939, through the execution, delivery and recordation of the new note and mortgage dated August 14, 1940, and the delivery of a check to the plaintiff for the unpaid balance of its first mortgage; that on said date a new mortgage was unconditionally delivered to the plaintiff, and that the parties intended, and the law conclusively presumes, a satisfaction and discharge of the mortgage of November 14, 1939. The defendant's further theory is that the judgment is inconsistent with the proper marshalling of the debtor's assets as required by law. The defendant's further theory is that the stipulation of counsel introduced into evidence *** was misconstrued as to the intent of the parties and even if

properly construed was given effect to which it was not legally entitled."

Plaintiff's theory is that "it sustained damages by reason of the wrongful conversion by the defendant of the aforesaid property in taking possession of the same under a certain chattel mortgage dated November 22, 1939, at a time when the plaintiff held two chattel mortgages upon said property, one being dated November 14, 1939, and the other being dated August 14, 1940, both of which mortgages were duly recorded. The plaintiff contends that the mortgage dated August 14, 1940, was delivered conditionally and did not constitute a payment and discharge of its earlier mortgage; that thereby plaintiff's earlier mortgage was at all times prior and senior in right to that held by the defendant."

Plaintiff's original chattel mortgage of November 14, 1939 was prior and paramount to defendant's chattel mortgage of November 22, 1939. But defendant claims that its chattel mortgage of November 22, 1939 became entitled to seniority by reason of the satisfaction of plaintiff's note and mortgage of November 14, 1939 through the execution and delivery to plaintiff of the new note and chattel mortgage by Stein on August 14, 1940 and its recordation on the same day. The defense of Holleb & Company in the trial court was that the transaction of August 14, 1940 between plaintiff and Stein constituted payment of the balance due on Stein's original note and the discharge of the lien of plaintiff's original chattel mortgage of November 14, 1939 given to secure the payment of said note. The question of payment under the facts herein necessarily involved the question as to whether the new note and chattel mortgage executed by Stein on August 14, 1940 were delivered absolutely or conditionally.

The evidence discloses that the new note and mortgage executed and delivered by Stein to the Loop Discount Corporation on August 14, 1940 were clearly intended by both plaintiff and Stein to extinguish the indebtedness evidenced by the original note of

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Plaintiff's original chattel mortgage of November 14, 1939 was prior and paramount to defendant's chattel mortgage of November 22, 1939. But defendant claims that its chattel mortgage of November 22, 1939 became entitled to seniority by reason of the satisfaction of plaintiff's note and mortgage of November 14, 1939 through the execution and delivery to plaintiff of the new note and chattel mortgage by Stein on August 14, 1940 and its recordation on the same day. The defense of Nolish & Company in the trial court was that the transaction of August 14, 1940 between plaintiff and Stein constituted payment of the balance due on Stein's original note and the discharge of the lien of plaintiff's original chattel mortgage of November 14, 1939 given to secure the payment of said note. The question of payment under the facts herein necessarily involved the question as to whether the new note and chattel mortgage executed by Stein on August 14, 1940 were delivered absolutely or conditionally.

The evidence discloses that the new note and mortgage executed and delivered by Stein to the Loop Discount Corporation on August 14, 1940 were clearly intended by both plaintiff and Stein to extinguish the indebtedness evidenced by the original note of

November 14, 1939 and to discharge the lien of the chattel mortgage of the same date but the evidence also discloses that plaintiff and Stein agreed and just as clearly intended that the acceptance of the new note and chattel mortgage by the Loop Discount Corporation was conditioned upon plaintiff's right to investigate to ascertain if there were any intervening liens against the mortgaged property.

Rosefield, plaintiff's manager, testified positively that he told Stein on August 14, 1940 that he was going away on his vacation that evening and that he would not have a chance until he returned to investigate the matter of possible intervening liens; that Stein told him that there were no claims or liens against the property in question; that Stein agreed that plaintiff might retain all of the documents pertaining to both the original and the new loans until it had made said investigation; and that it was further agreed that if plaintiff's investigation disclosed that there were no intervening liens the original note would be canceled and returned to Stein and the chattel mortgage of November 14, 1939 released, but that if liens were discovered which were prior and superior to the chattel mortgage of August 14, 1940 the latter and the note which it secured would be returned to Stein.

While Stein testified that Rosefield did not mention "claims" or "liens" to him, he stated that Rosefield did ask him about "executions." However, an examination of other portions of Stein's testimony shows that he corroborated Rosefield in respect to the latter's testimony that it was agreed that plaintiff might have time to investigate for the purpose of ascertaining if there were liens that would affect the priority of the chattel mortgage of August 14, 1940. Concerning the transaction of August 14, 1940 Stein testified, "That day, he told me that he is going to check up on it, and after that he is going to send me the old mortgage back." When asked if Rosefield said that "he would check up and send you the papers if everything cleared up," Stein answered "Yes."

It became unnecessary and it would have been only a useless formality for plaintiff

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It became unnecessary and it would have been only a useless formality for plaintiff

to investigate as to possible, intervening liens, since upon Rosefield's return from his vacation he found, as already stated, that defendant had taken possession of the mortgaged property and had commenced proceedings to foreclose its chattel mortgage of November 22, 1939.

Stein's new mortgage to plaintiff of August 14, 1940 was recorded upon the date of its delivery. Under the law of this state the recordation of this mortgage raised a presumption of unconditional delivery and cast the burden upon plaintiff of proving its conditional delivery. "The execution, acknowledgement and recording of the chattel mortgage raised the presumption of its acceptance by the mortgagee, and were prima facie evidence of delivery." Maxcy-Barton v. Glen Building Corporation, 355 Ill. 228. "The record of the mortgage was prima facie evidence of its delivery. The burden of showing that the acceptance came after the recorder had parted with the deed would seem to rest upon the appellant." Walton v. Barton, 107 Ill. 54. It is our opinion that plaintiff sustained its burden in this regard by proving that its representative, Rosefield, and Stein intended that when the new note and mortgage were delivered to plaintiff, they were accepted only on the condition that investigation would disclose no recorded liens that would affect the priority of the chattel mortgage of August 14, 1940.

It will be recalled that as part of the transaction of August 14, 1940 Rosefield made out two checks one for $704.88 and the other for $295.12. The latter represented the additional advance made to Stein which he deposited in his own bank account and the former represented the unpaid balance of $575 due on the original note plus accrued interest and certain charges for refunding said balance and making the additional loan of $295.12. Defendant contends that the check for $704.88 constituted payment of the balance due on the old note. This contention does not merit serious consideration. That check was plaintiff's check and not Stein's.

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All that it represented was money which he would owe plaintiff if the transaction of August 14, 1940 was consummated. He parted with nothing when he indorsed same. It was drawn by plaintiff and Stein merely indorsed it and handed it back. As already shown, it represented the balance due on the old note, accrued interest on such balance and refinancing charges, and with the check for $295.12 representing the additional advance to him constituted the $1,000 consideration for which the new note and chattel mortgage were given.

The chattel mortgage of August 14, 1940 having been delivered on the condition that there were no intervening liens that would affect its priority and the lien of defendant's chattel mortgage of November 22, 1939, having intervened, Stein's note of August 14, 1940 and his chattel mortgage of the same date which was given as security for the payment of same did not accomplish the payment of the balance due on the original note or serve to release plaintiff's original chattel mortgage. The lien of plaintiff's original chattel mortgage of November 14, 1939 never having been released, it is prior and superior to the lien of defendant's chattel mortgage of November 22, 1939.

The trial judge saw and heard the witnesses and since he was in a better position than we are to pass upon their credibility and inasmuch as the evidence amply justified his finding that the lien of plaintiff's chattel mortgage of November 14, 1939 was entitled to priority, there is no reason why his finding in that regard should be disturbed.

Defendant complains of the amount of the damages that was allowed plaintiff. The stipulation heretofore set forth shows on its face that defendant induced plaintiff to become a party to it by the representation of Holleb & Company that because it was in the wholesale grocery business it was in a more advantageous position to secure a higher price for the mortgaged property. The stipulation

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provided that, if the mortgaged property was sold for more than $1,000 and plaintiff prevailed in this litigation, the latter was entitled to receive damages in the amount of $1,000. As heretofore shown the property was sold by defendant for $1,300 but it did not deposit with the Clerk of the Municipal court $1,000 to cover plaintiff's damages as it was required to do under the terms of the stipulation. Defendant insists that the amount of damages which it was stipulated plaintiff should receive is in the nature of a penalty and that, regardless of the stipulation, plaintiff should be awarded damages not to exceed the actual damages it suffered. We agree with defendant that there was only due plaintiff on Stein's original note a balance of $575 and accrued interest thereon. If at the time plaintiff made demand upon defendant for the possession of the mortgaged property the latter made tender of said balance and the accrued interest thereon, plaintiff would have been required to accept same in full payment and to release its prior lien. But defendant made no such tender. It refused plaintiff's demand for possession and thereby forced the Loop Discount Corporation to also take possession of the mortgaged property and to institute foreclosure proceedings against same to protect its rights therein. Thus it became necessary for plaintiff to incur expenditures for costs, custodian fees and, in all likelihood, attorney's fees. It is true that plaintiff made no proof as to the amount of these expenditures and neither did it prove the amount of the accrued interest on the balance of $575 due on the original note. Was it necessary that plaintiff make such proof? We think not. It was lulled into the belief that it was unnecessary to prove these items of damage by the stipulation.

The following paragraph of the stipulation is significant as to what items of damages the parties contemplated would be included in the $1,000 agreed to be paid plaintiff as damages if the trial court found in its favor:

"That if the aforementioned cause in the Municipal Court of Chicago is adjudicated in favor of the Second Party, the Second Party will accept in full payment, satisfaction and release as

provided that, if the mortgaged property was sold for more than $1,000 and plaintiff prevailed in this litigation, the latter was entitled to receive damages in the amount of $1,000. As heretofore shown the property was sold by defendant for $1,500 but it did not deposit with the Clerk of the Municipal court $1,000 to cover plaintiff's damages as it was required to do under the terms of the stipulation. Defendant insists that the amount of damages which it was stipulated plaintiff should receive is in the nature of a penalty and that, regardless of the stipulation, plaintiff should be awarded damages not to exceed the actual damages it suffered. We agree with defendant that there was only due plaintiff on Stein's original note a balance of $375 and accrued interest thereon. If at the time plaintiff made demand upon defendant for the possession of the mortgaged property the latter made tender of said balance and the accrued interest thereon, plaintiff would have been required to accept same in full payment and to release its prior lien. But defendant made no such tender. It refused plaintiff's demand for possession and therefore forced the Loop Discount Corporation to also take possession of the mortgaged property and to institute foreclosure proceedings against same to protect its rights therein. Thus it became necessary for plaintiff to incur expenditures for costs, custodian fees and attorney's fees. It is true that plaintiff made no proof as to the amount of these expenditures and neither did it prove the amount of the accrued interest on the balance of $375 due on the original note. Was it necessary that plaintiff make such proof? We think not. It was lulled into the belief that it was unnecessary to prove these items of damage by the stipulation.

The following paragraph of the stipulation is significant as to what items of damages the parties contemplated would be included in the $1,000 agreed to be paid plaintiff as damages if the trial court found in its favor:

"That if the aforementioned cause in the Municipal Court of Chicago is adjudicated in favor of the Second Party, the Second Party will accept in full payment, satisfaction and release as

against First Party of any and all judgments, including court costs, attorney's fees, interest, costs and other charges, the sum hereinabove referred to as a sum to be realized out of the sale of said personal property, goods, wares, chattels and merchandise which is deposited with the Clerk of the Municipal Court of Chicago as aforesaid."

We cannot regard the $1,000 stipulated damages as a penalty since said amount is fairly and reasonably compensable of the actual damages suffered by plaintiff as indicated by the various items of damage heretofore referred to.

Holding as we do that plaintiff is entitled to recover damages in the amount of $1,000 which defendant stipulated and agreed to pay, it is unnecessary to discuss the question of marshalling of assets. Since the question as to the application of the law of escrow is raised for the first time in this court we also deem it unnecessary to discuss same.

For the reasons indicated herein the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

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For the reasons indicated herein the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

42513

317 I.A. 652

EDWARD J. LUSK,
Appellee,

v.

JOSEPH ZIARKO, MARYA ZIARKO
and JACOB TWARDZIK,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The complaint in this case in the nature of a creditor's bill was filed by plaintiff, Edward J. Lusk, against defendants Joseph Ziarko, Marya Ziarko and Jacob Twardzik, and is predicated upon two judgments one for $1,689.83 and the other for $122.89 rendered by the Municipal court of Chicago in favor of plaintiff and against the principal defendant, Joseph Ziarko. The cause was heard by the chancellor on plaintiff's complaint, defendants' answer and evidence presented upon the trial. The decree after finding that "all the material allegations of the plaintiff's complaint are true" ordered that plaintiff be granted the relief sought. This appeal is brought by defendants, who have not seen fit to include in the record filed in this court either their answer to plaintiff's complaint or a report of proceedings as to what occurred at the trial.

The complaint alleged substantially that plaintiff procured the entry in the Municipal court of Chicago of the aforesaid judgments; that Joseph Ziarko was the owner jointly with his wife, Marya Ziarko, of certain real estate in the city of Chicago; that on September 20, 1940, the Ziarkos conveyed this real estate by warranty deed to one Brigida Wolosia; that "said transfer and conveyance was without consideration, is not bona fide, and was made solely for the purpose of defrauding this complainant and avoiding payment upon the liability then incurred to this plaintiff, and in anticipation of the rendition of the judgment obtained by this plaintiff" in the Municipal court of Chicago; that also

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EDWARD J. LUSK,
Appellee,

v.

JOSEPH ZIARKO, MARYA ZIARKO
and JACOB TWARDZIK,
Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

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on the same date, September 20, 1940, Ziarko and his wife executed a first mortgage note in the principal sum of $5,000 together with interest notes and a trust deed to Jacob Twardzik, as trustee, to secure the payment of said notes; that "no consideration was paid for the said notes or trust deed given to secure said notes, but that the said trust deed was executed solely for the purpose of defrauding this plaintiff, and to avoid payment of the obligation to this plaintiff, and this plaintiff further charges the fact to be that Jacob Twardzik is in collusion and in conspiracy with the said Joseph Ziarko to assist the said Joseph Ziarko in avoiding payment of his obligations to the plaintiff herein; that the said Jacob Twardzik paid no consideration whatsoever to the said Joseph Ziarko, or his wife;" that "the said transfer to Brigida Wolosia is a fictitious transfer to a fictitious person;" and that "the possession of the real estate is still in Joseph Ziarko and his wife, and that the income from said real estate in still being paid to the said Joseph Ziarko."

The complaint also alleged that "while the business located in said property is ostensibly operated in the name of the wife of the said Joseph Ziarko, that in reality, it is the business of the said Joseph Ziarko, and is, therefore, liable to execution and sale for the collection of any judgment indebtedness of the said defendant, Joseph Ziarko."

As heretofore shown the decree found that all of the material allegations of plaintiff's complaint were true. It then ordered that the conveyance of the property in question by warranty deed by the Ziarkos to Brigida Wolosia "be declared null and void and of no force or effect," and adjudged that the lien of the trust deed to Jacob Twardzik, as trustee, "is subordinate to the lien of the judgments rendered in the Municipal Court of Chicago" in favor of plaintiff.

Defendants first contend that "the court should not have proceeded to annul the warranty deed executed by Joseph and Marya

on the same date, September 20, 1940, Starko and his wife executed a first mortgage note in the principal sum of $5,000 together with interest notes and a trust deed to Jacob Twardzik, as trustee, to secure the payment of said notes; that "no consideration was paid for the said notes or trust deed given to secure said notes, but that the said trust deed was executed solely for the purpose of defrauding this plaintiff, and to avoid payment of the obligation to this plaintiff, and this plaintiff further charges the fact to be that Jacob Twardzik is in collusion and in conspiracy with the said Joseph Starko to assist the said Joseph Starko in avoiding payment of his obligations to the plaintiff herein; that the said Jacob Twardzik paid no consideration whatsoever to the said Joseph Starko, or his wife;" that "the said transfer to Bridgie Volonis is a fictitious transfer to a fictitious person;' and that "the possession of the real estate is still in Joseph Starko and his wife, and that the income from said real estate is still being paid to the said Joseph Starko."

The complaint also alleged that "while the business located in said property is ostensibly operated in the name of the wife of the said Joseph Starko, that in reality, it is the business of the said Joseph Starko, and is, therefore, liable to execution and sale for the collection of any judgment indebtedness of the said defendant, Joseph Starko."

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Defendants first contend that "the court should not have proceeded to annul the warranty deed executed by Joseph and Marya

Ziarko and by them delivered to Brigida Wolosia without requiring said Brigida Wolosia to be made a party to the case."

This contention is without merit. Since the complaint charged specifically that Brigida Wolosia was a fictitious person and that Joseph Ziarko was still in possession of the property and collecting the income therefrom and since the decree found that all of the material allegations alleged in the complaint were true, such finding is conclusive that the conveyance by the principal defendant, Joseph Ziarko, and his wife to Brigida Wolosia, the grantee named in the aforementioned warranty deed, was fraudulent and it is also conclusive that Brigida Wolosia was a fictitious person. It being established that Brigida Wolosia was a fictitious person she could have no right, title or interest in or to the property and it was unnecessary to make her a party defendant. But defendants make the specious argument that, although all intendments are to be indulged in favor of the correctness of the decree in the absence of a report of proceedings containing the evidence heard at the trial and upon which the decree was based, "the evidence obviously showed that Brigida Wolosia was not a fictitious person, because it was found by the decree that the warranty deed was executed and delivered by Joseph Ziarko and Marya Ziarko, his wife, to one Brigida Wolosia." In this connection defendants stress the use of the word "delivered" and claim that by the use of that word in the decree the trial court must have found that Brigida Wolosia was not a fictitious person. The use of the word "delivered" in this particular finding of the decree does not necessarily import an actual physical tradition of possession from one hand to another (18 Corpus Juris, p. 477) and in view of the finding that Brigida Wolosia was a fictitious person it must be assumed that the trial court did not intend to find that the deed was actually delivered to a person not in being. In any event no mention is made of delivery in the ordering portion of the decree which is controlling. Only the execution and recordation of the deed to Brigida Wolosia is therein mentioned. While

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the law presumes delivery from the fact of recordation (Walter v. Blavka, 195 Ill. 610; Ackman v. Potter, 239 Ill. 578), the fact of recordation of an instrument does not prove the existence of the grantee, actual possession by the grantee nor its acceptance by such grantee. (Brown v. Brown, 167 Ill. 631.) Thus it was unnecessary to name the fictitious Brigida Wolosia as a defendant, she having no right, title or interest in or to the property.

Defendants make no objection to those portions of the decree which find and hold that the lien of the trust deed to Twardzik is subordinate to the lien of plaintiff's Municipal court judgments.

Defendants next contend that "the court erred in ordering the sale of personal property and real estate, regardless of whether the judgments could be satisfied by the sale of the real estate."

Section 11 (par. 11, chap. 77, Ill. Rev. Stat. 1941) of the act concerning judgments and decrees and the manner of enforcing same by execution, provides: "The person in whose favor execution is issued, may elect on what property not exempt from execution he will have the same levied, provided personal property shall be last taken."

The decree adjudged that the principal defendant was the owner of the grocery store conducted in the premises involved herein and that "the chattel mortgage dated October 3, 1940, and recorded October 9, 1940, *** executed by Joseph Ziarko and Marya Ziarko to Jacob Twardzik, is likewise subordinate to the lien of the aforesaid judgments."

As to defendants' contention that the trial court erred in ordering the sale of the personal property as well as the real estate to satisfy plaintiff's judgments, it is sufficient to state that defendants seemingly have failed to apprehend the true purport of the decree in this regard. There is no language used in this portion of the decree that can be construed as a direction to the bailiff of the Municipal court of Chicago as to the manner in which

the law presumes delivery from the fact of recordation (Miller v. Blayne, 197 Ill. 410; Eckman v. Potter, 239 Ill. 372), the fact of recordation of an instrument does not prove the existence of the grantee, actual possession by the grantee nor its acceptance by such grantee. (Brown v. Brown, 167 Ill. 621.) Thus it was unnecessary to name the fictitious Bridget Holcomb as a defendant, she having no right, title or interest in or to the property.

Defendants make no objection to those portions of the decree which find and hold that the lien of the trust deed to Twardzik is subordinate to the lien of plaintiff's municipal court judgments.

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The decree adjudged that the principal defendant was the owner of the property store conducted in the premises involved herein and that "the chattel mortgage dated October 5, 1940, and recorded October 9, 1940, *** executed by Joseph Mirko and Anna Mirko to Jacob Twardzik, is likewise subordinate to the lien of the aforesaid judgments."

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he is to enforce the executions issued pursuant to plaintiff's judgments rendered by said court. The decree merely defined the right of plaintiff to have sale upon the executions for the enforcement of his judgments against both the real and personal property belonging to the principal defendant but it did not direct the order in which the executions were to be levied. We must assume that the bailiff of the Municipal court of Chicago will in accordance with the provisions of the statute heretofore set forth first levy upon the real estate and, if the amount thereby recovered is insufficient to satisfy plaintiff's judgments, that he will then proceed under the executions to levy upon the personal property of Joseph Ziarko.

It is true that plaintiff's complaint contained no allegation concerning the chattel mortgage mentioned in the decree. However, the decree found that Joseph Ziarko was the real owner of the grocery store, although it was conducted in his wife's name, and, since it also found that a chattel mortgage in which Twardzik was named as the mortgagee had been executed and recorded and thus made a lien upon the contents of said store about the same time that the trust deed to the real estate was fraudulently executed and delivered to the said Twardzik, the chancellor properly directed in the decree that the lien of said chattel mortgage be subordinated to the lien of plaintiff's judgments. This finding and order were warranted under the prayer for general equitable relief contained in plaintiff's complaint.

The concluding paragraph of the decree adjudged that "nothing herein contained shall be construed in any way to affect the interest, title or right of Marya Ziarko as joint tenant." Defendants complain that the decree is uncertain and unenforcible because the chancellor did not determine the extent of the interest of either Joseph Ziarko or Marya Ziarko in the real estate. This proceeding was not concerned with the respective interests of Joseph Ziarko and Marya Ziarko in the property

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but rather with the question as to whether Joseph Ziarko fraudulently joined in the conveyance of same for the purpose of avoiding or evading the payment of plaintiff's judgments.

For the reasons stated herein the decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

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For the reasons stated herein the decree of the Circuit court of Coos county is affirmed.

DECREE AFFIRMED.

Frank and Sanborn, JJ., concur.

42289

ALBERT C. OSTROFF,
Appellee,

v.

A. J. CANFIELD CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover salary and bonuses alleged to be due him as sales manager for defendant under an oral employment contract, which was terminated by defendant before its expiration. The jury returned a verdict in his favor for $2,200, plus interest. Plaintiff remitted the interest, and the court thereupon entered the judgment for $2,200, from which defendant appeals.

The essential facts disclose that defendant was engaged in the business of manufacturing and selling bottled beverages. In the fall of 1936 plaintiff applied for a position with defendant, and was required to answer and file a "PERSONAL HISTORY AND EMPLOYMENT RECORD," to which was appended a statement, bearing his signature, wherein he agreed that "the employment obtained under this application may be terminated at the pleasure of either employer or employe without previous notice." He was thereupon engaged as salesman, and subsequently promoted to the offices of district supervisor and city sales manager, under oral contracts of employment, which yielded increases in salary from time to time and certain bonus payments. His initial salary was $50 a week, and at the end of 1936 he was paid a bonus of either $157 or $177. In March 1937 his salary was raised to $60 and he was promoted to the office of sales manager. In December of that year he received a bonus of $600. In May 1938 his salary was raised to $75. That was a banner year for defendant, but A. J. Canfield, its president, told plaintiff that be-

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cause of heavy building expansion and the purchase of additional trucks, the company could not pay a bonus at that time, and none was paid.

In December 1938 defendant's officers initiated sales plans for 1939, which plaintiff claims resulted in the oral agreement upon which his suit is predicated. They set up quotas to be attained for that year by the salesmen, and those figures were used as a basis for determining their compensation. Each salesman meeting his quota was to receive $100 extra, and Canfield instructed plaintiff to submit this proposal at a meeting of the salesmen. Plaintiff testified that January 3, 1939 Canfield told him that he deserved a bonus for 1938 but that the company was unable to pay it because of unusual capital expenditures; that he was going to give plaintiff $15 a week increase (bringing his salary up to $90 a week), but since the company could not then pay the increased salary, it would pay plaintiff the accumulated increase on the succeeding May 1st; that in accordance with certain tentative schedules which were received in evidence, a quota of $650,000 in aggregate sales was set up for 1939, and Canfield then said to plaintiff that "if you make this quota you will receive $1,200 bonus. If we go over $650,000 in sales in 1939 you will receive an additional $1,000, because there's enough profit in that figure to make everybody a lot of money in 1939;" that at plaintiff's suggestion Canfield authorized him, in March 1939, to present to the district managers under his supervision a plan whereby if their several quotas were attained, they were to receive a bonus of one-fourth cent per case upon beverages sold, that in April 1939, also with defendant's approval, plaintiff presented a plan to salesmen whereby each one who attained his sales quota for that year would receive a bonus of $100. The evidence discloses that bonuses of $100 were paid in 1939 to those salesmen who had made the quotas assigned to them, and bonuses were also paid to the district managers. It appears from the evidence that defendant's total sales for 1939 exceeded

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$650,000, but approximately two months before the expiration of the year, Canfield summarily discharged plaintiff for the reasons hereinafter set forth, and plaintiff claims to be entitled to the respective bonuses of $1,200 and $1,000, under the oral agreement to which he testified.

Some ten points are urged as ground for reversal, but the gravamen of the defense is that plaintiff failed to sustain the burden of proving the oral contract alleged by a preponderance of the evidence; and that he also failed to prove by a preponderance of the evidence that the written agreement appended to his application for employment in 1936, which provided that either party could terminate the employment without previous notice, was superseded or abandoned when the oral agreement was made. Upon trial defendant denied that any oral agreement existed; it relied in part on the statement appended to plaintiff's application as justification for plaintiff's discharge, claiming that in 1939 he was still employed under the original contract of employment made in 1936; that plaintiff disobeyed Canfield's order to visit a customer at Ford Sheridan, Illinois, and attended the races on that day instead; and that his relationship with a woman, other than his wife, as hereinafter more fully discussed, caused such dissension among the other employees as to necessitate and justify his dismissal.

It was of course incumbent on plaintiff to establish the oral agreement by a preponderance of evidence and to prove that the oral contract, made January 3, 1939, superseded any prior agreement. We think the record justifies the conclusion that he met that burden, and the jury so found. From the beginning his salary was increased every year and bonuses were paid to him in 1936 and 1937. The omission of a bonus in 1938 is satisfactorily explained. Each year's arrangement, involving new responsibilities by reason of his advancement to the offices of district supervisor and city sales manager at increased salary, constituted new agree-

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ments. Under the circumstances, we think the jury was justified, upon the evidence presented, in finding that a new oral agreement was made for the year 1939, which included bonuses for attaining and exceeding an aggregate sales quota fixed on the expectation that 1939 would, like 1938, yield large profits to defendant.

The remaining reason assigned for plaintiff's discharge is that he lived with one Ivy Summerell, whom he subsequently married, notwithstanding the fact that he had a wife and child living in Philadelphia. It appears that plaintiff and Miss Summerell were constant companions during much of the time plaintiff was employed by the Canfield Company, that they mingled with the officers and employees of defendant, and to all appearances led the life of an ordinary married couple. At times they visited the homes of A. J. Canfield and his son, stayed overnight, and were believed by defendant's officers to be husband and wife. Canfield learned of the actual relationship shortly before plaintiff was discharged, but none of the other officers or employees knew about it. Canfield verified plaintiff's marital status by a long-distance call to plaintiff's wife in Philadelphia, and thereafter called a meeting of the district managers and plaintiff's immediate subordinates, at which he disclosed the fact that plaintiff and Miss Summerell were not married and that plaintiff had a wife and child living elsewhere. It is argued by counsel for defendant that "Adultery is a criminal offense in Illinois, and in itself is ample ground for the discharge of plaintiff, contract or no contract." In pursuance of this proposition defendant sought to introduce detailed evidence of the information that Canfield had recently obtained with respect to plaintiff's marital status, but the court refused to receive such testimony, whereupon defendant offered to prove the substance of Canfield's telephone conversation with plaintiff's former wife, and to show that upon the disclosure of those facts defendant's employees became disgruntled by reason of plain-

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tiff's conduct. The reasons given by the trial court for refusing to receive the proferred evidence were that the relationship existing between plaintiff and Ivy Summerell was unknown to the personnel of the corporation until disclosed by Canfield after his telephone call to Philadelphia; that any dissension among the employees which might have resulted from the revelation of the facts was caused by Canfield's disclosure thereof to the employees, and not as the result of any open or notorious immorality on plaintiff's part; and there having been no damage or injury shown to the organization, either to its financial standing, or to its good will, name or reputation, or to the harmony of its personnel, prior to that revelation, defendant could not use the relationship as ground for a discharge upon the theory that it had caused dissension in its organization. We think this ruling was correct and in harmony with the authorities, which are generally to the effect that the acts complained of must have rendered the employee unfit to perform the duties which he has undertaken (Labatt on Master & Servant, vol. 1, sec. 295, p. 923.) "They must be in some way connected with the duties of the service." Larkin v. Hecksher, 51 N. J. L. 133, 3 L. R. A. 137. See also Brownell v. Ehrich, 43 App. Div. 369, 60 N. Y. Supp. 112. In any event, defendant's sales for 1939 had exceeded the quota fixed by the oral agreement, and the jury was evidently of the opinion that his extra-marital relationship did not affect the performance of his duties as sales manager; nor was it impressed by the charges of disobedience, nonperformance of duty or the other reasons assigned for plaintiff's discharge.

The case was fairly tried, and the controverted questions of fact were all submitted to the jury under full and proper instructions, which are not criticized by defendant. The judgment of the Municipal court should therefore be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

tiff's conduct. The reasons given by the trial court for refusing to receive the proferred evidence were that the relationship existing between plaintiff and Ivy Summerell was unknown to the personnel of the corporation until disclosed by Canfield after his telephone call to Philadelphia; that any dissension among the employees which might have resulted from the revelation of the facts was caused by Canfield's disclosure thereof to the employees, and not as the result of any open or notorious immorality on plaintiff's part; and there having been no damage or injury shown to the organization, either to its financial standing, or to its good will, name or reputation, or to the harmony of its personnel, prior to that revelation, defendant could not use the relationship as ground for a discharge upon the theory that it had caused dissension in its organization. We think this ruling was correct and in harmony with the authorities, which are generally to the effect that the acts complained of must have rendered the employee unfit to perform the duties which he has undertaken (Labatt on Master & Servant, vol. 1, sec. 595, p. 923.) "They must be in some way connected with the duties of the service." Larkin v. Hochkeber, 51 N. J. L. 133, 3 L. R. A. 127. See also Brownell v. Ehrich, 43 App. Div. 369, 60 N. Y. Supp. 112. In any event, defendant's sales for 1929 had exceeded the quota fixed by the oral agreement, and the jury was evidently of the opinion that his extra-marital relationship did not affect the performance of his duties as sales manager; nor was it impressed by the charges of disobedience, non-performance of duty or the other reasons assigned for plaintiff's discharge.

The case was fairly tried, and the controverted questions of fact were all submitted to the jury under full and proper instructions, which are not criticised by defendant. The judgment of the municipal court should therefore be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Keenan, J., concur.

42307

WILLIAM M. ZIPPERMAN,
Appellee,

v.

CHARLES WILTSE and
MYRTLE WILTSE,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

October 19, 1937 plaintiff had judgment by confession in the Circuit court of Cook county against Charles and Myrtle Wiltse for $3,318.82 and costs. In January, 1942, their attorneys appeared specially and moved to vacate the judgment on the ground that the note upon which it was predicated was not executed in Cook county and that neither of the defendants resided here at the date of the entry of the judgment. Their motion to vacate the judgment and to dismiss the suit was denied by the court, and this appeal followed.

It appears from the complaint and cognovit filed October 18, 1937, that July 15, 1929, at Momence, Illinois, defendants made a certain promissory note wherein they agreed to pay Wennerholm Brothers, one year after date, $1,912.15 with interest at 7 per cent. Subsequently Wennerholm Brothers indorsed this note and delivered it to William M. Zipperman, the plaintiff, for whom judgment by confession was entered in the Circuit court of Cook county in the sum of $3,318.82 and costs, which included the principal of the note, interest, and attorney's fees.

Thereafter, October 29, 1937, Zipperman, by written instrument, assigned the judgment against defendants to Edward Wennerholm, and a copy of the written assignment was filed in the office of the clerk of the Circuit court of Kankakee county, Illinois, January 11, 1939. A certified transcript of the judgment entered in the Circuit court of Cook county was also filed with the clerk of the Circuit court of Kankakee, October 25, 1937.

WILLIAM H. ZIPPERMAN,
Appellee,

v.

CHARLES WILTSE and
MYRTLE WILTSE,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

October 19, 1937 plaintiff had judgment by confession in the circuit court of Cook county against Charles and Myrtle Wiltse for $3,318.82 and costs. In January, 1942, their attorneys appeared specially and moved to vacate the judgment on the ground that the note upon which it was predicated was not executed in Cook county and that neither of the defendants resided here at the date of the entry of the judgment. Their motion to vacate the judgment and to dismiss the suit was denied by the court, and this appeal followed.

It appears from the complaint and cognovit filed October 19, 1937, that July 15, 1929, at Lemonce, Illinois, defendants made a certain promissory note wherein they agreed to pay Wennerholm Brothers, one year after date, $4,912.15 with interest at 7 per cent. Subsequently Wennerholm Brothers indorsed this note and delivered it to William H. Zipperman, the plaintiff, for whom judgment by confession was entered in the circuit court of Cook county in the sum of $3,318.82 and costs, which included the principal of the note, interest, and attorney's fees.

Thereafter, October 29, 1937, Zipperman, by written instrument, assigned the judgment against defendants to Edward Wennerholm, and a copy of the written assignment was filed in the office of the clerk of the circuit court of Kankakee county, Illinois, January 11, 1939. A certified transcript of the judgment entered in the circuit court of Cook county was also filed with the clerk of the circuit court of Kankakee, October 29, 1937.

April 19, 1939 an execution upon the transcript of judgment and the assignment thereof was issued by the clerk of the Circuit court of Kankakee county and delivered to the sheriff of that county, who made a personal demand on each of the defendants April 24, 1939 and returned the execution "No Part Satisfied." In May 1939 Edward Wennerholm, the assignee of the judgment, was adjudged a bankrupt by the United States District court at Danville, Illinois, and John R. Canright was appointed trustee of his estate. September 17, 1941 another execution was issued by the clerk of the Circuit court of Kankakee county, and thereafter a levy was made upon real estate in Kankakee county owned by the defendants. The real estate was advertised for sale by the sheriff and the sale set for January 16, 1942. January 15, 1942, defendants filed in the Circuit court of Kankakee county a bill for an injunction to restrain the sheriff from selling the property and an injunction issued out of the Circuit court, without notice and without bond. No attempt was ever made by defendants to vacate the judgment entered against them in the Circuit court of Cook county in October 1937 until January 20, 1942, when their special appearance was filed by counsel and a motion made to vacate the original judgment. It thus appears that both defendants had personal knowledge of the proceedings in question long prior to the making of their motion in the Circuit court of Cook county.

The motion to vacate the original judgment was supported by the defendants' affidavits. Charles Wiltse alleged in substance that he was a resident of the Town of Momence, County of Kankakee, Illinois, that he resided in that county all his life, that he had never resided in the County of Cook, and that the judgment note in question was not executed in Cook county, Illinois.

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The motion to vacate the original judgment was supported by the defendants' affidavits. Charles Fitts alleged in substance that he was a resident of the Town of Momence, County of Kankakee, Illinois, that he resided in that county all his life, that he had never resided in the County of Cook, and that the judgment note in question was not executed in Cook county, Illinois.

The affidavit of Myrtle Wiltse was substantially to the same effect.

The court set the motion for hearing and disposition on February 10, 1942, at which time Charles Wiltse filed an additional affidavit alleging that June 13, 1941 an execution was issued by the clerk of the Circuit court of Kankakee county and served upon him by the sheriff of that county; that the execution recited that a judgment had lately been recovered in the Circuit court of Kankakee county by John R. Canright, trustee of the estate of Edward Wennerholm, assignee of William M. Zipperman, and that it was impossible for him to determine from the execution when or where the judgment was entered; and he attached a copy of the execution to his affidavit. He further alleged that September 17, 1941 another execution was issued by the clerk of the Circuit court of Kankakee county which recited that a judgment had lately been recovered in the Circuit court of that county by Wennerholm,assignee of Zipperman, and it was impossible for Wiltse to determine from the execution when or where the judgment was entered; that at the time of the last execution he saw a notice in a local paper stating that his farm was to be sold, and thereupon employed counsel to find out when and where the judgment was entered and to take the necessary steps to prevent the sale; that he did not know in what court or on what date the judgment was obtained until he was so advised by his attorneys. Attached was the additional affidavit of Myrtle Wiltse which alleged that during the entire year 1937 she was employed in Chicago, Illinois, in a beauty shop on Cottage Grove avenue by one Dorothy Rix; that while so employed in Chicago she rented a one-room kitchenette as a convenience in connection with her employment and paid her rent every two weeks; that she stayed at this address but never regarded it as her residence; that she returned to her home at 515 East Indiana street at Momence, Illinois, on the average of once a week, where she kept all her clothes, except what she needed for immediate

The affidavit of Myrtle Hilles was substantially to the same effect.

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use; that she never removed any of her household goods or her furniture from Momence, never voted in Chicago, but when she did vote she voted at Momence, Illinois; that in the years 1937, 1938 and 1939, when she registered as a beauty culturist with the Department of Registration and Education at Springfield, Illinois, she gave her address as Momence, Illinois; and that while employed in Chicago she took out her social security card and again gave her residence as Momence, Illinois.

Upon this state of the record the defendants contend that a judgment entered by a court in a county other than where the note is executed or where the defendants reside has no force or validity, and they rely on par. 174, subpar. 5, chap. 110 of the Illinois Revised Statutes, State Bar Ass'n, Ed. 1937, which reads: "Any person for a debt bona fide due may confess judgment by himself or attorney duly authorized either in term time or vacation, without process. Judgments entered in vacation shall have like force and effect, and from the date thereof, become liens in like manner and extent as judgments entered in term; provided, however, that such application to confess judgment, whether made in term time or vacation, shall be made in the county in which the note or obligation was executed or in the county where one or more of the defendants reside. A judgment entered by any court in any county other than those herein specified shall have no force or validity, anything in the power to confess to the contrary notwithstanding."

Cases cited by defendants in support of their contention deal generally with the meaning of the word "residence" as used in the divorce statute of Illinois, chap. 40, par. 6, or as used in section 1, article VII of the Illinois Constitution, which pertains of the right of suffrage.

The salient question presented is whether at the date of the entry of the judgment in October 1937 Myrtle Wiltse was a resident of Cook County within the meaning of the statutory provision hereinbefore set forth. It clearly appears that she came to

use; that she never removed any of her household goods or her furniture from Momence, never voted in Chicago, but when she did vote she voted at Momence, Illinois; that in the years 1932, 1933 and 1939, when she registered as a beauty culturist with the Department of Registration and Education at Springfield, Illinois, she gave her address as Momence, Illinois; and that while employed in Chicago she took out her social security card and again gave her residence as Momence, Illinois.

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The salient question presented is whether at the date of the entry of the judgment in October 1937 Myrtle Hilles was a resident of Cook County within the meaning of the statutory provision hereinbefore set forth. It clearly appears that she came to

Chicago about 1930 and was engaged in business here from that time. It is conceded that she was separated from her husband, who resided in Momence, Illinois. During all those years she maintained an apartment in Chicago, was employed in Chicago, and lived here continuously except for the frequent visits which she says she made to Momence. For voting purposes she may have still considered Momence as her residence, but that was a state of mind which a creditor could not ascertain. If plaintiff had brought suit on the note, instead of confessing judgment thereon, the sheriff of Cook county could undoubtedly have served her at her apartment in Chicago with either a summons or an execution and it would have constituted good service, and her husband could have been joined with her as a defendant and service could have been had upon him in Kankakee county. Harrison v. National Bank of Monmouth, 108 Ill. App. 493. Under the circumstances we think it would be placing a narrow and strained construction upon the statute in question to hold that Myrtle Wiltse was not a resident of Cook county within the contemplation of the statute. To all intents and purposes she resided here, had her place of business in Chicago, spent every business day in the city, and returned to Momence only at such times and on such occasions as her business affairs permitted. In determing the right of a citizen to vote or in ascertaining the venue of a party in divorce proceedings, the intention is the determining factor, but there is nothing in the statute which would justify such a construction with respect to the entry of judgments, especially in view of the facts here presented.

The equities in this case are all in favor of plaintiff. Defendants make no claim of a meritorious defense to the indebtedness. When the court denied their motion to vacate the judgment a provision was incorporated in the order giving them leave to allow their special appearance to stand as a general appearance and to file an affidavit of defense in ten days. No defense was filed by either of them. Moreover, it affirmatively appears

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that both of them had personal knowledge of the proceedings in question for several years prior to the entry of their motion to vacate, and if they desired to take advantage of the statute it was their duty to act within a reasonable time after they learned of the entry of the judgment. They have thus failed to show either a meritorious defense or diligence.

For the foregoing reasons we are of opinion that the motion to vacate the judgment was properly denied, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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For the foregoing reasons we are of opinion that the motion to vacate the judgment was properly denied, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Keenan, J., concur.

42340

317 I.A. 654

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN J. KRONENBITTER,
Appellee,

v.

BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE VILLAGE OF MAYWOOD, ILLINOIS; EARL K. BROBERG, Village President; CLARENCE A. TAVENDER, Village Clerk; HARRY M. STAUP, Village Comptroller; LOUIS ANCEL, Village Attorney; FERRIN KAAPKE, Village Treasurer; E. D. HUMPHREYVILLE, Chief Fire Officer of Fire Department of the Village of Maywood; SOL REICHENBURG, Secretary of the Maywood Firemen's Pension Fund; CLYDE STAUP and DAVID SMITH, Trustees and Members of said Board of Trustees and Members of the Firemen's Pension Fund of the Village of Maywood,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1934 plaintiff brought suit by mandamus, seeking to have his name enrolled as a beneficiary of the Firemen's Pension Fund of the Village of Maywood. The order of the Circuit court awarding the writ was affirmed in People ex rel. Kronenbitter v. Board of Trustees etc., 279 Ill. App. 472. The Firemen's Pension Act (Cahill's Illinois Revised Statutes 1933, ch. 24, pars. 928 et seq.) provides in substance that where a fireman has served 20 years and has paid all sums due the pension fund (par. 934), and when $25,000 has been accumulated in the pension fund (par. 931), the retiring fireman is entitled to a pension of one-half of his monthly salary. On the former appeal defendants argued, inter alia, that plaintiff had not served the required 20 years as a fireman within the meaning of the act, contending that after having served approximately five years as driver of the hose cart for the village, he was appointed fire marshal and continued in that position for 25 years; but we held that manifestly he was a fireman during all the time that he was employed, and having reached the required age of 50 years, was entitled to a pension. Paragraph 931 of the statute provides in effect that a permanent fund of

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN J. MONHEIMER, appellee,	
v.	
BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE VILLAGE OF MAYWOOD, ILLINOIS; HARL K. DOBERRO, Village President; CLARENCE A. FAVERSHAM, Village Clerk; HARRY E. STAUP, Village Comptroller; LOUIS AMCHI, Village Attorney; FERRIN KAAPKE, Village Treasurer; H. D. HUMMELSTEVILLE, Chief Fire Officer of Fire Department of the Village of Maywood; BOL RICHTEMBURG, Secretary of the Maywood Firemen's Pension Fund; CLYDE STAUP and DAVID SMITH, Trustees and Members of said Board of Trustees and Members of the Firemen's Pension Fund of the Village of Maywood, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

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$25,000 shall be received, accumulated and retained as a permanent pension fund, and only the excess above that amount shall be available for the purposes of the pension fund. At the time of the appeal, the total amount in the Firemen's Pension Fund was approximately $4,000, and the order appealed from, and here affirmed, directed defendants to enroll plaintiff's name as beneficiary "of and from the 26th day of May, A. D. 1934," and it was directed that he "be paid out of the said pension funds when available for the payment of pensions a monthly pension of One Hundred and Nine ($109.16) Dollars and sixteen cents from and after said date of May 26, 1934."

It is conceded that pursuant to that order plaintiff received 13 payments of $109.16 each, or a total of $1,419.08, and that on March 1, 1942, there was in the pension fund the sum of $26,771.41, $25,000 of which is to be kept in the treasury as a permanent fund. Petitioner in this proceeding for mandamus claims the balance of the fund in excess of $25,000. The Circuit court entered an order awarding him the balance of $1,771.41 in the fund, from which an appeal is taken.

Defendants take the position that under the order of October 27, 1934, which was subsequently affirmed, petitioner is entitled only to his monthly payments of $109.16, when there shall be in the pension fund an excess over $25,000, and that the order should not be construed as creating additional rights for the petitioner. We do not think that order or our former opinion is susceptible of this construction. The order directed defendants to enroll plaintiff's name as a beneficiary of the fund, and plainly fixes the time as "of and from the 26th day of May, A. D. 1934." He was therefore entitled to be paid $109.16 for each and every month since that date, but the payments were not to commence until the pension fund had reached $25,000. The required sum having been accumulated, petitioner is entitled to receive, in addition to

$25,000 shall be received, accumulated and retained as a permanent pension fund, and only the excess above that amount shall be available for the purposes of the pension fund. At the time of the appeal, the total amount in the Firemen's Pension Fund was approximately $4,000, and the order appealed from, and here affirmed, directed defendants to enroll plaintiff's name as beneficiary "of and from the 26th day of May, A. D. 1934," and it was directed that he "be paid out of the said pension funds when available for the payment of pensions a monthly pension of One Hundred and Nine (109.16) Dollars and sixteen cents from and after said date of May 26, 1934."

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his current monthly payments of $109.16, such excess money as may be in the fund, until all the moneys due him since May 26, 1934 are fully paid. When the order was entered the required sum of $25,000 had not been accumulated, and the order therefore directed that plaintiff be paid out of the funds "when available for the payment of pensions a monthly pension of One Hundred and Nine ($109.16) Dollars and sixteen cents from and after said date of May 26, 1934." There is nothing ambiguous or confusing about this order; it means that when $25,000 shall have been accumulated in the fund, petitioner shall be paid the sum of $109.16 each month from and after May 26, 1934. Defendants complied with the order by placing petitioner on the pension roll as of that date, and he has been paid monthly the sum of $109.16 ever since $25,000 was accumulated. For the period intervening between the date on which the petitioner was placed on the pension roll and the time when the fund reached the sum of $25,000, petitioner received nothing, but the order fixed the date as of which he was entitled to his pension at May 26, 1934. Therefore, since there is now a surplus in the fund of $1,771.41, he is entitled to have that amount applied to his pension at the rate of $109.16 beginning with May 26, 1934, in accordance with the prior order.

The Circuit court properly so held, and its judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

his current monthly payments of $109.16, such excess money as may be in the fund, until all the moneys due him since May 26, 1934 are fully paid. When the order was entered the required sum of $25,000 had not been accumulated, and the order therefore directed that plaintiff be paid out of the funds "when available for the payment of pensions a monthly pension of One Hundred and Nine ($109.16) Dollars and sixteen cents from and after said date of May 26, 1934." There is nothing ambiguous or confusing about this order; it means that when $25,000 shall have been accumulated in the fund, petitioner shall be paid the sum of $109.16 each month from and after May 26, 1934. Defendants complied with the order by placing petitioner on the pension roll as of that date, and he has been paid monthly the sum of $109.16 ever since $25,000 was accumulated. For the period intervening between the date on which the petitioner was placed on the pension roll and the time when the fund reached the sum of $25,000, petitioner received nothing, but the order fixed the date as of which he was entitled to his pension at May 26, 1934. Therefore, since there is now a surplus in the fund of $1,771.41, he is entitled to have that amount applied to his pension at the rate of $109.16 beginning with May 26, 1934, in accordance with the prior order.

The circuit court properly so held, and its judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, J., and Keenan, J., concur.

42454

317 I.A. 635

RAYMOND B. GLAUM,
Appellant,

v.

WALTER J. CUMMINGS and DANIEL C. GREEN, as Receivers, etc., et al., doing business as CHICAGO SURFACE LINES,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while stepping from one of defendants' street cars near the intersection of Vincennes avenue and 89th street, Chicago, and brought suit for damages on the theory that defendants were negligent (1) in failing to furnish him with a reasonably safe place to alight on arriving at his destination; (2) in failing to stop the car at the regular stopping place; and (3) in failing to keep a proper and sufficient lookout for vehicles passing along the right-of-way and warning him of the approach of such vehicles. Plaintiff appeals from a judgment entered on a directed verdict in favor of defendants at the close of plaintiff's case.

The accident occurred at about 7:30 p.m. December 16, 1938. There is substantially no dispute as to the salient facts preceding the accident. Plaintiff, then 19 years old, was returning to his home after work. He boarded a street car at 35th and Halsted streets, intending to alight at 89th street and Vincennes avenue. As the car approached his destination, he proceeded to the rear platform and told the conductor he wanted to get off at 89th street. Just as the car stopped or while it was still slightly in motion, he stepped to the pavement and was struck and severely injured by an automobile driven by Fred Marchbank.

A railroad viaduct, approximately 120 feet in width, passes over Vincennes avenue immediately to the north of 89th street. There is a white marker on a pole at the southwest corner of 89th street, and the accident occurred about 100 feet north of

RAYMOND B. GLAUM, Appellant,	
v.	APPEAL FROM SUPERIOR COURT,
BALTIMORE & OHIO RAILROAD and DANIEL C. GREEN, as Receivers, etc., et al., doing business as CHICAGO SURFACE LINES, Appellees.	COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while stepping from one of defendants' street cars near the intersection of Vincennes avenue and 89th street, Chicago, and brought suit for damages on the theory that defendants were negligent (1) in failing to furnish him with a reasonably safe place to alight on arriving at his destination; (2) in failing to stop the car at the regular stopping place; and (3) in failing to keep a proper and sufficient lookout for vehicles passing along the right-of-way and warning him of the approach of such vehicles. Plaintiff appeals from a judgment entered on a directed verdict in favor of defendants at the close of plaintiff's case.

The accident occurred at about 7:30 p.m., December 16, 1938. There is substantially no dispute as to the salient facts preceding the accident. Plaintiff, then 19 years old, was returning to his home after work. He boarded a street car at 37th and Halsted streets, intending to alight at 89th street and Vincennes avenue. As the car approached his destination, he proceeded to the rear platform and told the conductor he wanted to get off at 89th street. Just as the car stopped or while it was still slightly in motion, he stepped to the pavement and was struck and severely injured by an automobile driven by Fred Barenbaum.

A railroad viaduct, approximately 120 feet in width, passes over Vincennes avenue immediately to the north of 89th street. There is a white marker on a pole at the southwest corner of 89th street, and the accident occurred about 100 feet north of

that pole. At the time of the accident the rear end of the street car was about 5 feet inside of the viaduct. The distance between the west curb of 89th street and the street car is 11 feet 6 inches, and there is evidence that Marchbank's automobile was approximately 7 feet in width, thus leaving a clearance of approximately two feet between the Marchbank car and the back platform of the street car and the same distance between the automobile and the side of the viaduct.

It is undisputed that just before alighting plaintiff looked to the north and saw the headlights of Marchbank's automobile at the other end of the viaduct, approximately 100 feet to the rear, but he was unable to approximate the speed at which the automobile was coming toward the street car. In the course of examination plaintiff described the events immediately preceding the accident as follows: "I stepped down from the platform without looking to see how close the automobile was until I got on the step and without looking I stepped down to the street. I saw him approaching when I was still on the platform and I didn't see it again. I was alighting from the street car in a natural walking movement. I was in no hurry. After looking and seeing the headlights I then started to look where I was and stepped to go on the street."

Plaintiff's counsel argue that it was the carrier's duty to furnish plaintiff a safe place to alight and to exercise proper care for his safety immediately thereafter and not to place him in a position of peril. The various cases cited undoubtedly express the rule of law on that proposition, and if the record contained any evidence indicating that plaintiff was in the exercise of due care for his own safety, this circumstance would have entitled plaintiff to have the question of defendants' negligence submitted to the consideration of the jury. His own evidence, however, clearly indicates that he saw the headlights on Marchbank's car just before he stepped down from the rear platform to the pavement and that he was aware of the fact that an automobile was being

that pole. At the time of the accident the rear end of the street car was about 5 feet inside of the viaduct. The distance between the west curb of 89th street and the street car is 11 feet 6 inches, and there is evidence that Marchbank's automobile was approximately 7 feet in width, thus leaving a clearance of approximately two feet between the Marchbank car and the back platform of the street car and the same distance between the automobile and the side of the viaduct.

It is undisputed that just before alighting plaintiff looked to the north and saw the headlights of Marchbank's automobile at the other end of the viaduct, approximately 100 feet to the rear, but he was unable to approximate the speed at which the automobile was coming toward the street car. In the course of examination plaintiff described the events immediately preceding the accident as follows: "I stepped down from the platform without looking to see how close the automobile was until I got on the step and without looking I stepped down to the street. I saw him approaching when I was still on the platform and I didn't see it again. I was alighting from the street car in a natural walking movement. I was in no hurry. After looking and seeing the headlights I then started to look where I was and stepped to go on the street."

Plaintiff's counsel argue that it was the carrier's duty to furnish plaintiff a safe place to alight and to exercise proper care for his safety immediately thereafter and not to place him in a position of peril. The various cases cited undoubtedly express the rule of law on that proposition, and if the record contained any evidence indicating that plaintiff was in the exercise of due care for his own safety, this circumstance would have entitled plaintiff to have the question of defendants' negligence submitted to the consideration of the jury. His own evidence, however, clearly indicates that he saw the headlights on Marchbank's car just before he stepped down from the rear platform to the pavement and that he was aware of the fact that an automobile was being

driven in the same direction only a short distance back of the street car. Nevertheless, according to his own testimony, he stepped down from the platform without looking to see how close the automobile was and then, as he states, he proceeded to walk leisurely toward the curb of the viaduct without paying any attention to the approaching automobile. Having made this trip daily he was undoubtedly familiar with the intersection and the street under the viaduct where the accident occurred. He therefore had notice of the situation, and ordinary prudence required that he should proceed with care reasonably commensurate with that situation. Russell v. Richardson, 308 Ill. App. 11. It is a well established rule of law that due care of the plaintiff is a separate and distinct question from any claim of negligence on the part of defendants (Russell v. Richardson, supra; Carson Pirie Scott & Co. v. Chicago Railways Co., 309 Ill. 346; Bushman v. Calumet and South Chicago Railway Co., 214 Ill. App. 435), and therefore, even though there may have been evidence of defendants' negligence, there was no evidence from which the jury could fairly have found that plaintiff was in the exercise of due care for his own safety at the time of and immediately preceding the occurrence.

It is also urged that defendants violated their duty to plaintiff in failing to stop at their usual and customary stopping place. Plaintiff's counsel say that the white marked pole 100 feet to the south of the point where the car stopped was the place where passengers were customarily discharged, and on the trial they offered to prove by Marchbank, who was familiar with the site of the accident, that the customary practice of the defendants on and before December 16, 1938 was to stop their cars at the south side of 89th street, opposite the trolley pole in question. When the offer was made the court and counsel retired to chambers, and defendants then called attention to various provisions of chap. 188 of Hodes' Municipal Code of Chicago, as well as to orders of the Illinois Public Utilities Commission, entered December 30,

driven in the same direction only a short distance back of the street car. Nevertheless, according to his own testimony, he stepped down from the platform without looking to see how close the automobile was and then, as he states, he proceeded to walk leisurely toward the curb of the viaduct without paying any attention to the approaching automobile. Having made this trip daily he was undoubtedly familiar with the intersection and the street under the viaduct where the accident occurred. He therefore had notice of the situation, and ordinary prudence required that he should proceed with care reasonably commensurate with that situation. Russell v. Richards, 308 Ill. App. 11. It is a well established rule of law that due care of the plaintiff is a separate and distinct question from any claim of negligence on the part of defendants (Russell v. Richardson, supra; Carson Pirie Scott & Co. v. Chicago Railways Co., 309 Ill. 346; Bradman v. Calumet and South Chicago Railway Co., 214 Ill. App. 435), and therefore, even though there may have been evidence of defendants' negligence, there was no evidence from which the jury could fairly have found that plaintiff was in the exercise of due care for his own safety at the time of and immediately preceding the occurrence.

It is also urged that defendants violated their duty to plaintiff in failing to stop at their usual and customary stopping place. Plaintiff's counsel say that the white marked pole 100 feet to the south of the point where the car stopped was the place where passengers were customarily discharged, and on the trial they offered to prove by Kerchbaum, who was familiar with the site of the accident, that the customary practice of the defendants on and before December 16, 1932 was to stop their cars at the south side of 95th street, opposite the trolley pole in question. When the offer was made the court and counsel retired to chambers, and defendants then called attention to various provisions of chap. 131 of Moses' municipal Code of Chicago, as well as to orders of the Illinois Public Utilities Commission, entered December 30,

1920, which made it unlawful and imposed a penalty for the street car company to receive or discharge passengers other than at the nearest crossing in the direction in which the car is going, and accordingly the court sustained defendants' objection to the offer. We think the ruling was proper. It has been consistently held that a custom cannot be invoked to avoid a settled rule of law or to prevail against or overcome a statute, and such an alleged custom is therefore not binding. Geiselman v. Roddinghaus, 158 Ill. App. 316; Entwhistle v. Henke, 211 Ill. 273; Young v. McKittrick, 267 Ill. App. 267; and various other cases cited in defendants' brief.

The charge in the complaint and the contention that defendants owed plaintiff a duty to warn him of the approach of Marchbank's car is unavailing in view of plaintiff's undisputed statements that he had seen the headlights of the approaching automobile and was therefore aware of the existing danger. There is no evidence that the conductor saw the headlights, but assuming he did, a warning to plaintiff would not have added anything to the knowledge which he already had of the approach of Marchbank's car.

Before the case was submitted to the jury, plaintiff's motion to withdraw a juror as to Marchbank, who had been joined as a defendant, was allowed, and the cause was continued as to him. No evidence was introduced as to Marchbank's negligence as charged in the complaint, and nothing that we have said herein is intended to prejudice plaintiff's case against Marchbank when and if it is tried.

On the record presented, it was the duty of the trial court to direct a verdict in favor of defendants for the reasons stated, and the judgment of the Superior court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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The charge in the complaint and the contention that defendants owed plaintiff a duty to warn him of the approach of Burchbank's car is unavailing in view of plaintiff's undisputed statements that he had seen the headlights of the approaching automobile and was therefore aware of the existing danger. There is no evidence that the conductor saw the headlights, but assuming he did, a warning to plaintiff would not have added anything to the knowledge which he already had of the approach of Burchbank's car.

Before the case was submitted to the jury, plaintiff's motion to withdraw a juror as to Burchbank, who had been joined as a defendant, was allowed, and the cause was continued as to him. No evidence was introduced as to Burchbank's negligence as charged in the complaint, and nothing that we have said herein is intended to prejudice plaintiff's case against Burchbank when and if it is tried.

On the record presented, it was the duty of the trial court to direct a verdict in favor of defendants for the reasons stated, and the judgment of the superior court is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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MARY SMITH,
Appellant,

v.

FRED SOLGER,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was a tenant on the third floor of an apartment building at 3600 Greenview avenue, Chicago, with porches and stairways in the rear, which was owned by defendant. On October 27, 1938 she slipped while descending the back stairway, and brought suit for injuries sustained. Trial by jury resulted in a verdict and judgment in favor of defendant, from which plaintiff appeals.

There was a platform between the back porch in the rear of plaintiff's apartment and the back porch of the apartment next door. Leading down from this platform was the stairway which descends to the second floor. On the right-hand side of the stairway was a blank wooden wall which ran from the steps to the roof. On the left-hand side of the steps in going down were the pickets of a fence which extended around the edge of the third floor platform. There were no handrails on either side of the stairway.

The complaint charged defendant with negligence (1) in permitting bacon, vegetables and other substances to be and remain on the porch and steps; (2) in maintaining the porch and steps in a slippery and dangerous condition; and (3) in failing to provide handrails as specified by the city ordinance. The jury returned a general verdict of not guilty, and in addition thereto made answers to the two following interrogatories in writing, propounded at the request of the defendant, over plaintiff's objection:

"Question: Do you find that grease or a piece of bacon was a proximate cause of plaintiff's fall?"

MARY MURTIN, Appellant,	APPEAL FROM SUPERIOR COURT,
v.	COOK COUNTY.
FRED SOLOMON, Appellee.	

MR. JUSTICE FRICK DELIVERED THE OPINION OF THE COURT.

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There was a platform between the back porch in the rear of plaintiff's apartment and the back porch of the apartment next door. Leading down from this platform was the stairway which descends to the second floor. On the right-hand side of the stairway was a blank wooden wall which ran from the steps to the roof. On the left-hand side of the steps in going down were the pickets of a fence which extended around the edge of the third floor platform. There were no banisters on either side of the stairway.

The complaint charged defendant with negligence (1) in permitting bacon, vegetables and other substances to be and remain on the porch and steps; (2) in maintaining the porch and steps in a slippery and dangerous condition; and (3) in failing to provide handrails as specified by the city ordinance. The jury returned a general verdict of not guilty, and in addition thereto made answers to the two following interrogatories in writing, proposed at the request of the defendant, over plaintiff's objection:

"Question: Do you find that grease or a piece of bacon was a proximate cause of plaintiff's fall?"

"Answer: No."

"Question: Do you find that the defendant had a handrail in compliance with the ordinances of the City of Chicago on the rear stairway of the premises described in the evidence?"

"Answer: Yes."

In view of the general verdict of not guilty and the answer to the first interrogatory, it is apparent that the jury found (1) that neither grease nor other substances were the proximate cause of plaintiff's fall, and (2) that defendant did not maintain the porch and steps in a slippery and dangerous condition. By their answer to the second interrogatory, they found that there was a handrail. From photographs introduced in evidence and the testimony of witnesses, it is apparent that there was no such handrail as is required by the city ordinance (sec. 1436 (b), Revised Chicago Code of 1931), and it is urged that in submitting the interrogatory, the court permitted the jury to decide a question that was exclusively for the court. It is contended by defendant, however, that "The construction of the stairway in question complies with the requirements of the City ordinance," and his counsel say that it was a question of fact for the jury to determine whether the railing on top of the fence around the platform constituted a handrail. The record shows that the fence on the left-hand side of the stairway was about 4 feet high, with a 2 x 4 railing on top. The riser on each step was 7-1/4 inches high. By referring to the photograph it appears that the post which sustains the third floor platform was located at the third step down from the top. The third step, therefore, was 21 inches below the platform, and the step was 69 inches below the railing on the platform which the defendant now contends was a handrail. Edward H. Nordlie, who had been a plan examiner for the City of Chicago for over 30 years, testified that "a handrail must be thirty inches and not to exceed thirty-six inches above the steps," and that the stairway shown by the photograph in evi-

"Answer: No."

"Question: Do you find that the defendant had a handrail in compliance with the ordinances of the City of Chicago on the rear stairway of the premises described in the evidence?"

"Answer: Yes."

In view of the general verdict of not guilty and the answer to the first interrogatory, it is apparent that the jury found (1) that neither grease nor other substances were the proximate cause of plaintiff's fall, and (2) that defendant did not maintain the porch and steps in a slippery and dangerous condition. By their answer to the second interrogatory, they found that there was a handrail. From photographs introduced in evidence and the testimony of witnesses, it is apparent that there was no such handrail as is required by the city ordinance (sec. 1496 (b), Revised Chicago Code of 1931), and it is urged that in submitting the interrogatory, the court permitted the jury to decide a question that was exclusively for the court. It is contended by defendant, however, that "The construction of the stairway in question complies with the requirements of the City ordinance," and his counsel say that it was a question of fact for the jury to determine whether the railing on top of the fence around the platform constituted a handrail. The record shows that the fence on the left-hand side of the stairway was about 4 feet high, with a 2 x 4 railing on top. The riser on each step was 7-1/4 inches high. By referring to the photograph it appears that the post which sustains the third floor platform was located at the third step down from the top. The third step, therefore, was 21 inches below the platform, and the step was 39 inches below the railing on the platform which the defendant now contends was a handrail. Edward H. Mordlie, who had been a plan examiner for the City of Chicago for over 30 years, testified that "a handrail must be thirty inches and not to exceed thirty-six inches above the steps," and that the stairway shown by the photograph in evi-

dence was an open stairway which required a handrail on both sides. Whether this form of construction complied with the requirements of the city ordinance was a question of law for the court and it was therefore improper to submit such an interrogatory to the jury.

While interrogatories may be submitted to a jury calling for answer on ultimate questions of fact, it is improper to submit an interrogatory calling for a conclusion of law. Peoria, B. & C. Traction Company v. O'Connor, 149 Ill. App. 598; Byers v. Thompson, 66 Ill. 421; Lence v. Insurance Co., 147 Ill. App. 259. None of the foregoing cases present situations precisely applicable to the case at bar, but they express the settled rule of law that it is improper to submit instructions or interrogatories to a jury calling for legal conclusions. It was undoubtedly prejudicial to plaintiff's case to allow the jury to speculate on whether the railing on top of the fence around the platform complied with the requirements of the city ordinance.

Criticism is also made of the instruction touching upon the credibility of witnesses, which plaintiff's counsel says has been held erroneous in the recent decisions of People v. Wells, 380 Ill. 347, and People v. Flynn, 378 Ill. 351. If the case is retried, counsel will undoubtedly avoid submitting the instruction in its present form.

For the reasons indicated, we are of opinion that the judgment ought to be reversed and the cause remanded for a new trial, and it is so ordered.

JUDGMENT REVERSED AND
CAUSE REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

hence was an open statutory which required a hearing on both sides. Whether this form of construction complied with the requirements of the city ordinance was a question of law for the court and it was therefore improper to submit such an interrogatory to the jury.

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Criticism is also made of the instruction touching upon the credibility of witnesses, which plaintiff's counsel says has been held erroneous in the recent decisions of People v. Sells, 380 Ill. 347, and People v. Flynn, 378 Ill. 391. If the case is retried, counsel will undoubtedly avoid submitting the instruction in its present form.

For the reasons indicated, we are of opinion that the judgment ought to be reversed and the cause remanded for a new trial, and it is so ordered.

JUDGMENT REVERSED AND
CAUSE REMANDED.

Mulivan, P. J., and Scanlan, J., concur.

42531

PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,)
)
v.) ERROR TO MUNICIPAL
)
JOHN BORYSZEWSKI,) COURT OF CHICAGO
Plaintiff in Error.)

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

June 8, 1942 an information was filed in the Municipal court, charging defendant with passing through a red light at Western avenue and Harrison street, Chicago, and striking a pedestrian. He interposed a plea of not guilty, and the cause was set for trial September 10, 1942, and thereafter continued to September 24, when defendant again entered a plea of not guilty, and waived trial by jury. The court found him "guilty in manner and form as charged in the information," and imposed a fine of $500 and costs. Defendant thereupon moved to vacate the judgment and that motion was set for hearing on September 30, at which time his counsel filed an affidavit in support of a motion for a further continuance, and the cause was thereupon set for trial October 2, 1942, and on that day again continued to October 15, 1942. October 14 defendant served the People with notice that he would seek further postponement of the motion to vacate when the cause was reached on the following day. October 15 the court overruled the motion and ordered defendant to stand committed to the House of Correction, from which order he has sued out this writ of error.

After the matter had been disposed of in the Municipal court the parties agreed upon the following Statement of Facts:

"It is Hereby Stipulated and Agreed by and between counsel for the People and counsel for the defendant, for the purpose of an appeal, that this cause came on for trial on September 24, A. D. 1942, before the Honorable Erwin J. Hasten, one of the Judges of The Municipal Court of Chicago, on a Complaint by Individual, one Francis O'Grady, that defendant

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	
v.	ERROR TO MUNICIPAL
JOHN BORYSZEWSKI, Plaintiff in Error.	COURT OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

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After the matter had been disposed of in the municipal court the parties agreed upon the following statement of Facts:

"It is Hereby Stipulated and Agreed by and between counsel for the People and counsel for the defendant, for the purpose of an appeal, that this cause came on for trial on September 24, A. D. 1942, before the Honorable Irwin J. Master, one of the Judges of The Municipal Court of Chicago, on a Complaint by Individual, one Francis O'Grady, that defendant

drove through a red light on June 6, 1942, and struck a pedestrian, as charged in the information; that after a plea of not guilty by the defendant of the charge in that complaint on said September 24, 1942, at the trial the People did not produce Brother Leo as a witness to testify that he was the particular person so injured at said time, but introduced the testimony of two other persons which tended to show that the defendant ran through a red light and injured a pedestrian, the same Brother Leo. Testimony, however, was introduced that Brother Leo was in a sanitarium in St. Louis, Missouri, recovering from the amputation of his leg. People's evidence also showed that the defendant drove for two blocks past the point where the pedestrian was struck and stopped and returned to the scene of the accident. Also that defendant admitted to having had 5 or 6 beers and that he staggered and had liquor on his breath.

"On the part of the defendant he introduced the testimony of himself alone in which he denied that he ran his automobile through a red light at said time, stating that he had a green light in front of him when some object came into contact with his car at his right-hand fender.

"Defendant testified that he had only 2 beers.

"Which are all the facts stipulated and agreed to by said parties."

Reversal is sought on several grounds. It is first urged that the information is fatally insufficient to support a finding of guilt because "(a) in the averment 'drove a Ford sedan, License Number 125964, on Western Avenue at Harrison Street and went through a red light,' the information lacks the word 'there' and the words 'then and thereby;' consequently, there is not that necessary degree of certainty between the alleged 'went through a red light' and the alleged injuries sustained by a 'pedestrian;' (b) the allegation, 'struck a pedestrian,' is insufficient to support a finding of guilty."

drove through a red light on June 6, 1942, and struck a pedestrian, as charged in the information; that after a plea of not guilty by the defendant of the charge in that complaint on said September 24, 1942, at the trial the people did not produce Brother Leo as a witness to testify that he was the particular person so injured at said time, but introduced the testimony of two other persons which tended to show that the defendant ran through a red light and injured a pedestrian, the same brother Leo. Testimony, however, was introduced that Brother Leo was in a sanitarium in St. Louis, Missouri, recovering from the amputation of his leg. People's evidence also showed that the defendant drove for two blocks past the point where the pedestrian was struck and stopped and returned to the scene of the accident. Also that defendant admitted to having had 5 or 6 beers and that he staggered and had liquor on his breath.

"On the part of the defendant he introduced the testimony of himself alone in which he denied that he ran his automobile through a red light at said time, stating that he had a green light in front of him when some object came into contact with his car at his right-hand fender.

"Defendant testified that he had only 2 beers.

"Which are all the facts stipulated and agreed to by said parties."

Reversal is sought on several grounds. It is first urged that the information is totally insufficient to support a finding of guilt because "(a) in the averment 'drove a Ford sedan, License Number 12?964, on Eastern Avenue at Harrison street and went through a red light,' the information lacks the word 'there' and the words 'then and thereby;' consequently, there is not that necessary degree of certainty between the alleged 'went through a red light' and the alleged injuries sustained by a 'pedestrian;' (b) the allegation, 'struck a pedestrian,' is insufficient to support a finding of guilty."

The rule is well settled that if an information contains all the essential elements of a public offense, even though they are to some extent defectively stated, it will be held sufficient and judgment will not be arrested. People v. Weber, 152 Ill. App. 102; People v. Garfinkle, 169 Ill. App. 554; People v. Bennett, 185 Ill. App. 316. Moreover, defendant made no objection to the sufficiency of the information, and the rule in this state is likewise well settled that where no motion is made to quash, the information will be considered sufficient, after verdict, if it apprised the defendant of the crime or charge on which he was tried. The information at bar charged reckless driving under the statute, and the gist of the charge is not that a person was injured but rather that the manner in which the accused operated his automobile was such as to amount to a willful and wanton disregard for the property or safety of others. Defendant complains because the identity of the person struck by his automobile when he passed the red light, does not appear in the information. Identity is not an element constituting the charge of reckless driving; the injury was the result of defendant's recklessness, and therefore the pedestrian's identity did not have to be averred. The evidence upon the hearing disclosed that the pedestrian was one Brother Leo, who at the time of trial was confined in a St. Louis hospital following the amputation of one of his legs. Defendant was sufficiently apprised of the facts with which he was charged to enable him to prepare a defense. If he had questioned the sufficiency of the information, the state could have amended it to supply the deficiency, if any existed. But since he did not do so until after the court had heard the cause, made its finding, and imposed a fine, the objection urged would not justify a reversal.

It is next contended that the court erred in refusing to grant a further continuance of defendant's formal written motion to vacate the judgment October 15. The various continuances entered prior thereto sufficiently answer this contention. De-

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It is next contended that the court erred in refusing to grant a further continuance of defendant's formal written motion to vacate the judgment October 15. The various continuances entered prior thereto sufficiently answer this contention. De-

fendant's original motion was entered September 24, continued to September 30, again postponed to October 2, and finally continued to October 15. This gave him ample time to present his motion, and it was not error for the court to deny the final continuance. Defendant cites and relies on People v. Blumenfeld, 330 Ill. 474, wherein it was held that a person charged with crime should be given full opportunity to place the court in possession of all the facts bearing upon the question of guilt or innocence. However, the circumstances of that case are not applicable to this proceeding. Blumenfeld's defense to the indictment was an alibi. At the time of the crime he was some 900 miles away, and the only witnesses he would have been able to produce to substantiate his alibi were also out of the jurisdiction. Moreover, his attorney was engaged in an involved law suit in a different city, and the crime was perpetrated more than two years before defendant's arrest. The court found that these circumstances entitled him to a continuance, and therefore reversed the judgment. There was no urgency in the case at bar. Defendant had submitted to trial, was represented by counsel, and after a finding of guilty and sentence, three continuances were granted him, which were ample to enable him to present his motion.

It is also suggested that the court misapprehended the charge and imposed an unusually large fine, "thinking that the charge was driving while under the influence of intoxicating liquors" as defined in par. 144, sec. 47 of the Motor Vehicles Act (ch. 95-1/2, Ill. Rev. Stat. 1941). There is no basis for this contention. The court had the information before it, and in view of the evidence of reckless driving presented, there could have been no misapprehension about the character of the charge upon which defendant was being tried. It is also argued that the court allowed the case to go to judgment without having the injured man in court. This contention is likewise untenable because there was sufficient evidence to support the finding adduced from two eyewitnesses, one a police officer stationed at the scene of the accident,

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and another disinterested witness. Any evidence which the injured pedestrian could have given, would have been merely cumulative. Other contentions, namely, that the court allowed a special prosecutor to assist the state, and "that the court was more interested in collecting the $500 fine than in seeking to find out further facts which might have led him to doubt defendant's guilt," require no discussion.

The reasons assigned for reversal are of a purely technical nature and without merit. Therefore, the judgment of the Municipal court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

and another disinterested witness. Any evidence which the injured pedestrian could have given, would have been merely cumulative. Other contentions, namely, that the court allowed a special prosecutor to assist the state, and "that the court was more interested in collecting the $500 fine than in seeking to find out further facts which might have led him to doubt defendant's guilt," require no discussion.

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JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

41539

LITHUANIA BUILDING LOAN AND HOMESTEAD ASSOCIATION, a corporation, ADAM SUBAITIS, ANTON KANTRIMAS and JOHN KUCHINSKAS, JR., individually and as Liquidators of the Lithuania Building Loan and Homestead Association, a corporation,
(Plaintiffs) Appellees and Cross-Appellants,

v.

MARGARET EWALD, individually and as administratrix of the estate of John P. Ewald, deceased, the JOHN P. EWALD REALTY COMPANY, INC., THE KEISTUTO LOAN AND BUILDING ASSOCIATION NO. 1, a corporation, PETER KASKY, MARY KASKY, MARIE KASKY, and THE DISTRICT NATIONAL BANK OF CHICAGO, a corporation,
Defendants.

THE KEISTUTO LOAN AND BUILDING ASSOCIATION NO. 1, a corporation,
(Defendant) Appellant and Cross-Appellee.

PETER KASKY, MARY KASKY and MARIE KASKY,
(Defendants) Cross-Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Lithuania Building Loan and Homestead Association, a corporation, and Adam Subaitis, Anton Kantrimas and John Kuchinskas, Jr., individually and as Liquidators of that Association, filed a complaint in the nature of a bill in equity against Margaret Ewald, individually and as administratrix of the Estate of John P. Ewald, deceased, the John P. Ewald Realty Company, Inc., The Keistuto Loan and Building Association No. 1, a corporation, Peter Kasky, Mary Kasky, Marie Kasky, and The District National Bank of Chicago, a corporation, in which plaintiffs prayed that two certain mortgages, described in the complaint (one executed by Mary Kasky and the other by Mary, Peter and Marie Kasky, and which were executed for moneys advanced to them by the Lithuania Association), "be deemed to be good and valid first liens and encumbrances upon the real estate and premises described in said documents as fully and effectually as though the same had not been heretofore cancelled or in any manner released [by plaintiffs], and that the plaintiffs be restored to all the rights, terms, covenants and provisions in said documents contained; that

LITHUANIA BUILDING LOAN AND HOMESTEAD
ASSOCIATION, a corporation, ADAM
SUBAITIS, ANTON KANTRIMAS and JOHN
KUCHINSKAS, JR., individually and as
liquidators of the Lithuania Building-
ing Loan and Homestead Association,
a corporation,
(Plaintiffs) Appellees and Cross-Appellants,

v.

MARGARET EWALD, individually and as
administratrix of the estate of John
P. Ewald, deceased, the JOHN P. EWALD
REALTY COMPANY, INC., THE KEISTUTO LOAN
AND BUILDING ASSOCIATION NO. 1, a cor-
poration, PETER KASKY, MARY KASKY,
MARIE KASKY, and THE DISTRICT NATIONAL
BANK OF CHICAGO, a corporation,
Defendants.

THE KEISTUTO LOAN AND BUILDING ASSO-
CIATION NO. 1, a corporation,
(Defendant) Appellant and Cross-Appellee,

PETER KASKY, MARY KASKY and MARIE KASKY,
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the said releases heretofore executed by the plaintiffs herein and delivered to the said defendant The Keistuto Loan and Building Association No. 1 bearing date January 1, 1939, and recorded * * * be wholly cancelled and held for naught; that the said mortgage and trust deed heretofore executed by the said Mary Kasky, Peter Kasky and Marie Kasky on January 19, 1939, and recorded * * * be cancelled and set aside and for naught esteemed; and that said defendants herein, or some of them, be ordered and decreed to pay to the plaintiffs herein any and all costs for the recording and restoration of said documents and such other expenses herein as may be incurred by the plaintiffs herein; and that said The Keistuto Loan and Building Association No. 1, its agents and attorneys, be directed to deliver up and surrender for cancellation herein the aforesaid mortgage obtained by it as aforesaid, and any and all guarantee policies, abstracts and any and all memorandum of title relating to said premises; the plaintiffs herein offering to return the aforesaid check [a check made by the John P. Ewald Realty Company, Inc., in favor of the Liquidators of the Lithuania Association] and do any and all things equitably required of them to be done and performed in the premises. * * *

"Plaintiffs also pray that if upon the hearing it may appear that said documents * * * can not in justice and equity be restored, or that said plaintiffs may not have any relief in reference thereto, that the said court may order and adjudge that the said The Keistuto Loan and Building Association No. 1 and the said John P. Ewald Realty Co., Inc., be ordered and directed to pay to your said plaintiffs the amount of $10,717.91, together with legal interest thereon from the date of said check, and that upon a failure so to do that the said plaintiffs herein be deemed to have a valid first lien upon the real estate in the several parcels hereinabove described for said sum; and that upon the failure of the defendants herein or some of them, to pay said sum,

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that said premises be sold as in other cases of foreclosure for the payment of said indebtedness and interest, and for expenses and costs of the plaintiffs herein, including attorney's, stenographer's and Master's fees, as provided in said mortgages formerly held and owned by the plaintiffs herein as appear from the same duly recorded in the Recorder's office of Cook County, Illinois, as aforesaid.

"Plaintiffs also pray that a temporary injunction herein do forthwith issue restraining and enjoining the John P. Ewald Realty Co., Inc., Margaret Ewald individually and as administratrix of the estate of John P. Ewald, deceased, and The District National Bank of Chicago from paying out or disbursing any moneys on deposit in the account of the John P. Ewald Realty Co., Inc., until further order of the court herein; and that upon a final hearing any money on deposit as aforesaid be applied herein on the sums found to be due and owing to the plaintiffs as hereinabove set forth; and that the plaintiffs may have such other, further and different relief in the premises as may to equity appertain."

The day after the complaint was filed plaintiffs obtained an injunction against The District National Bank of Chicago, defendant, enjoining it from "disbursing, transferring, paying out or otherwise disposing of any money on deposit or any stocks, bonds, mortgages, securities or other property of The John P. Ewald Realty Co., Inc., that may be in its possession or control."

No question is raised on the pleadings. After the pleadings were settled the cause was referred to a master in chancery, who heard evidence and filed a report in which he made certain findings and "recommends that the prayer of said complaint and the amendment filed thereto be granted." The Keistuto Loan and Building Association No. 1 (hereinafter also called "Keistuto"), Peter Kasky, Mary Kasky and Marie Kasky filed objections to the report, which were overruled by the master. After the chancellor

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"Plaintiffs also pray that a temporary injunction herein do forthwith issue restraining and enjoining the John P. Swald Realty Co., Inc., Margaret Swald individually and as administratrix of the estate of John P. Swald, deceased, and the District National Bank of Chicago from paying out or disbursing any moneys on deposit in the account of the John P. Swald Realty Co., Inc., until further order of the court herein; and that upon a final hearing any money on deposit as aforesaid be applied herein on the sums found to be due and owing to the plaintiffs as herein-above set forth; and that the plaintiffs may have such other, further and different relief in the premises as may to equity appertain."

The day after the complaint was filed plaintiffs obtained an injunction against The District National Bank of Chicago, defendant, enjoining it from "disbursing, transferring, paying out or otherwise disposing of any money on deposit or any stocks, bonds, mortgages, securities or other property of The John P. Swald Realty Co., Inc., that may be in its possession or control."

No question is raised on the pleadings. After the pleadings were settled the cause was referred to a master in chancery, who heard evidence and filed a report in which he made certain findings and "recommends that the prayer of said complaint and the amendment filed thereto be granted." The Keistuto Loan and Building Association No. 1 (hereinafter also called "Keistuto"), Peter Kasky, Mary Kasky and Marie Kasky filed objections to the report, which were overruled by the master. After the chancellor

had considered exceptions filed by Peter, Mary and Marie Kasky (hereinafter called the "Kaskys" unless a particular one is to be designated) and Keistuto to the master's report a decree was entered, which finds that "the defendants Peter Kasky, Mary Kasky and Marie Kasky ought not be and are not chargeable with any liability upon the mortgages * * * or either of such mortgages, or upon the agreements, or either of them, secured by the said respective mortgages; and that the defendants Peter Kasky, Mary Kasky and Marie Kasky ought not suffer or sustain any loss or be chargeable with any liability by reason of any of the acts of John P. Ewald, set forth in the pleadings herein or disclosed by the record herein;" that the Kaskys are entitled to have considered as good and valid instruments the release deeds and that the said release deeds sufficiently and effectively discharge the liens of plaintiffs' mortgages. The decree further finds that Ewald, in drawing the check for $10,717.91 on the account of the John P. Ewald Realty Company, Inc., and which was made payable to plaintiffs, acted solely as the agent of Keistuto and that said association is liable to plaintiffs for the amount of that check. The decree further finds that the sum of $3,675.45 on deposit with The District National Bank of Chicago in the account of John P. Ewald Realty Company, Inc., less the sum of $12.70, to which that bank is entitled for its costs and expenses, is the property of Keistuto, having been wrongfully taken from it by Ewald, and that plaintiffs are equitably entitled to have the sum of $3,662.75 applied on account of the liability of Keitstuto to plaintiffs. The decree adjudges and decrees (a) that the complaint as amended is dismissed for want of equity as to defendants Peter Kasky, Mary Kasky and Marie Kasky; (b) that defendant The District National Bank of Chicago ~~xxx~~ pay the sum of $3,662.75 to plaintiffs to apply on the liability of Keistuto to plaintiffs; (c) that defendant Keistuto pay to plaintiffs within ten days the sum of $7,055.16, being the difference between $10,717.91 and the said sum of $3,662.75, and that execution issue for the sum of $7,055.16

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in favor of plaintiffs and against defendant Keistuto. The decree retains jurisdiction to enter an additional judgment against Keistuto in the event the bank does not pay to plaintiffs the said $3,662.75, and to enter a decree in favor of Keistuto against said bank for said balance remaining on deposit with said bank in the event that Keistuto pays to plaintiffs the $10,717.91. The decree makes the temporary injunction entered against The District National Bank of Chicago permanent, and assesses all costs of the proceedings against defendant Keistuto. By an order thereafter entered the said bank was allowed to pay the funds remaining in its hands to the clerk of the court and the judgment against it was declared satisfied.

Plaintiffs appeal from the decree and contend: "1. The chancellor having found that there was fraud in the execution of the releases, should have cancelled the same, as prayed for in the complaint and as recommended by the Master. 2. As there had been no payment of the mortgages, plaintiffs were entitled to a foreclosure thereof, as recommended by the Master. The court erred in sustaining exceptions to the Master's report. 3. The chancellor erred in the entry of a common law judgment against the Keistuto Association for the principal amount due only. There should have been judgment against the mortgagors also for interest and attorney fees as provided in the mortgages. Plaintiffs should not be penalized for the fraud of the mortgagors' agents but should have payment as the mortgages provided. 4. There should be an order reversing the judgment of the Superior Court and remanding the cause with directions to overrule objections to the Master's report and enter a decree for cancellation of the releases and foreclosing the mortgages of plaintiffs as prior liens, as recommended in the report of the Master in Chancery." Keistuto appeals from the decree and contends, inter alia, that "the chancellor erred in holding that John P. Ewald was in all that he did the agent solely of this defendant;" that "the chancellor

in favor of plaintiffs and against defendant Keistuto. The decree retains jurisdiction to enter an additional judgment against Keistuto in the event the bank does not pay to plaintiffs the said $4,662.75, and to enter a decree in favor of Keistuto against said bank for said balance remaining on deposit with said bank in the event that Keistuto pays to plaintiffs the $10,717.91. The decree makes the temporary injunction entered against the District National Bank of Chicago permanent, and assesses all costs of the proceedings against defendant Keistuto. By an order thereafter entered the said bank was allowed to pay the funds remaining in its hands to the clerk of the court and the judgment against it was declared satisfied.

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erred in holding that the money remaining on deposit in the bank is the money of this defendant;" that "the chancellor erred in finding that John P. Ewald acted as the agent of this defendant in drawing a check on the account of the John P. Ewald Realty Co., Inc. for the sum of $10,717.91 making the same payable to the liquidators and in holding this defendant liable for said sum of money, and entering judgment against it;" that Ewald was not its agent in writing the check in question and in delivering the same to plaintiffs and that Keistuto cannot be charged with representations made by him in that regard. Keistuto does not attack the decree so far as it applies to the Kaskys. Indeed, in its reply brief it concedes that the Kaskys were innocent in the entire transaction and that they exercised the ordinary care that could have been expected of them.

Keistuto is a going building and loan association. On April 19, 1938, Lithuania Building Loan and Homestead Association (hereinafter also called "Lithuania"), then a going building and loan association, went into voluntary liquidation, and its shareholders, acting in accordance with the law, appointed Adam Subaitis, Anton Kantrimas and John Kuchinskas, Jr., liquidators (hereinafter called "Liquidators"), to wind up the affairs of the association. The shareholders passed a resolution containing instructions to the Liquidators. The instructions provided, inter alia, that the offices of all of the then officers and directors be vacated and that all of the assets of Lithuania be turned over to the Liquidators, when they qualified, and that they be thereafter entirely responsible for such assets. The assets consisted almost entirely of notes and agreements of members, secured by mortgages on realty. The Liquidators qualified and have since been acting as Liquidators.

The Kaskys were the owners of two pieces of real estate in Chicago, known as 2001 to 7 Canalport avenue and 7325 South Union avenue. On May 26, 1930, Mary Kasky borrowed a certain sum from Lithuania and as evidence of the debt she executed an agreement

erred in holding that the money remaining on deposit in the bank is the money of this defendant;" that "the chancellor erred in finding that John P. Swald acted as the agent of this defendant in drawing a check on the account of the John F. Smald Realty Co., Inc. for the sum of $10,717.92 making the same payable to the liquidators and in holding this defendant liable for said sum of money, and entering judgment against it;" that Swald was not its agent in writing the check in question and in delivering the same to plaintiffs and that Kolatuto cannot be charged with representations made by him in that regard. Kolatuto does not attack the decree so far as it applies to the Kaslys. Indeed, in its reply brief it concedes that the Kaslys were innocent in the entire transaction and that they exercised the ordinary care that could have been expected of them.

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The Kaslys were the owners of two pieces of real estate in Chicago, known as 2001 to 7 Campbell avenue and 7329 South Union avenue. On May 26, 1930, Mary Kasly borrowed a certain sum from Lithuania and as evidence of the debt she executed an agreement

and a mortgage conveying one of the two pieces of real estate to Lithuania, and on December 11, 1930, all of the Kaskys borrowed a further sum and made a mortgage on both pieces of real estate. For some time prior to January 1, 1939, the Kaskys desired to pay the two mortgages, and between January 16 and January 19, 1939, they borrowed $11,300.66 from Keistuto and gave a mortgage upon their two pieces of real estate to the latter as security. In order to borrow from Keistuto they had to become shareholders in that association. Keistuto's officers made a check payable to the Kaskys and left the same with Ewald, the secretary of the association. Other material facts are later stated in this opinion.

In our opinion the chancellor was justified in first determining the rights of the Kaskys and we will follow the chancellor in that regard. Plaintiffs contend that the Kaskys "deposited their funds with the Secretary of the Keistuto Association and authorized him to pay the plaintiffs;" that "their said representative [Ewald] prepared releases of plaintiffs' mortgages and presented same with a fraudulent check to plaintiffs and thereby obtained plaintiffs' signatures on the releases; that the drawing and delivery of a check without funds is a gross fraud," and plaintiffs are entitled to the relief they asked against the Kaskys. The Kaskys contend that an examination of the entire record will conclusively show that the chancellor was justified in finding that the equities were with them and in dismissing the complaint as to them. As we have reached the conclusion, after a careful study of the evidence, that the chancellor was justified in dismissing the complaint as to the Kaskys, we will refer to certain peaks in the evidence that have aided us in reaching our conclusion: That John P. Ewald was guilty of illegal conduct in the refinancing transactions is conceded by all of the parties. He was a real estate broker and had also been the secretary of Keistuto for a period of about twenty-eight years. He had also been the secretary and a director of Lithuania for ten years prior to the time it went into liquidation and until that time he had

and a mortgage conveying one of the two pieces of real estate to Lithuania, and on December 11, 1930, all of the Raslys borrowed a further sum and made a mortgage on both pieces of real estate. For some time prior to January 1, 1929, the Raslys desired to pay the two mortgages, and between January 16 and January 17, 1929, they borrowed $11,300.66 from Kelstuto and gave a mortgage upon their two pieces of real estate to the latter as security. In order to borrow from Kelstuto they had to become shareholders in that association. Kelstuto's officers made a check payable to the Raslys and left the same with Zwald, the secretary of the association. Other material facts are later stated in this opinion.

In our opinion the chancellor was justified in first determining the rights of the Raslys and we will follow the chancellor in that regard. Plaintiffs contend that the Raslys "deposited their funds with the Secretary of the Kelstuto association and authorized him to pay the plaintiffs;" that "their said representative [Zwald] prepared releases of plaintiffs' mortgages and presented same with a fraudulent check to plaintiffs and thereby obtained plaintiffs' signatures on the releases; that the drawing and delivery of a check without funds is a gross fraud," and plaintiffs are entitled to the relief they asked against the Raslys. The Raslys contend that an examination of the entire record will conclusively show that the chancellor was justified in finding that the equities were with them and in dismissing the complaint as to them. As we have reached the conclusion, after a careful study of the evidence, that the chancellor was justified in dismissing the complaint as to the Raslys, we will refer to certain points in the evidence that have aided us in reaching our conclusion: That John K. Zwald was guilty of illegal conduct in the refinancing transactions is conceded by all of the parties. He was a real estate broker and had also been the secretary of Kelstuto for a period of about twenty-eight years. He had also been the secretary and a director of Lithuania for ten years prior to the time it went into liquidation and until that time he had

officed with that association. At the time of the transaction in question and prior thereto he was the agent of Lithuania in collecting rents of half a dozen buildings in which that association was interested. After Lithuania went into liquidation he officed with Keistuto. He was the president and had sole control of the John P. Ewald Realty Company; he owned the company. Irene Kuchinskas was the attorney for Lithuania and also for Keistuto. As heretofore stated, the Kaskys were indebted to Lithuania upon the two mortgages held by plaintiffs. In the latter part of December, 1938, plaintiff Liquidators, the Kaskys, Ewald (representing Keistuto), and Irene Kuchinskas met at the office of plaintiffs for the purpose of discussing the refinancing of the two mortgages. After the Liquidators had agreed to reduce the amount of the mortgage deeds $500, Ewald stated that Keistuto would make a new mortgage for the Kaskys in order to carry out the refinancing. A short time before the Kaskys executed the mortgage to Keistuto the Liquidators delivered the two mortgages and agreements that belonged to Lithuania to Ewald and they were placed in the files of Keistuto. These mortgages and agreements were never returned to plaintiffs and they never requested their return. In fact, they never saw them again until they were produced at the trial. Early in January, 1939, Adam Subaitis, one of the Liquidators, went to the home of Peter Kasky and told Peter and his wife that they should go to Keistuto, "that the papers are all ready; we could go over there and sign them up," and some time between January 16 and January 19, 1939, the Kaskys went to the office of Keistuto, where Ewald presented the new mortgage papers for them to sign. After the Kaskys saw in Ewald's possession the two old mortgages and the agreement papers that they had executed and that belonged to Lithunia, they executed the new mortgage. Ewald then presented a check payable to the Kaskys for $10,800.56 executed by Keistuto and told the Kaskys to indorse it, which they did. At that time the Kaskys had no knowledge as to the ten prior

officed with that association. At the time of the transaction in question and prior thereto he was the agent of Lithuania in collecting rents of half a dozen buildings in which that association was interested. After Lithuania went into liquidation he officed with Kelstuto. He was the president and had sole control of the John P. Heald Realty Company; he owned the company. Irene Kuminskas was the attorney for Lithuania and also for Kelstuto. As heretofore stated, the Kuskys were indebted to Lithuania upon the two mortgages held by plaintiffs. In the latter part of December, 1938, plaintiff liquidators, the Kuskys, Heald (representing Kelstuto), and Irene Kuminskas met at the office of plaintiffs for the purpose of discussing the refinancing of the two mortgages. After the liquidators had agreed to reduce the amount of the mortgage debts $750, Heald stated that Kelstuto would make a new mortgage for the Kuskys in order to carry out the refinancing. A short time before the Kuskys executed the mortgage to Kelstuto the liquidators delivered the two mortgages and agreements that belonged to Lithuania to Heald and they were placed in the files of Kelstuto. These mortgages and agreements were never returned to plaintiffs and they never requested their return. In fact, they never saw them again until they were produced at the trial. Early in January, 1939, Adam Subaitis, one of the liquidators, went to the home of Peter Kusky and told Peter and his wife that they should go to Kelstuto, "that the papers are all ready; we could go over there and sign them up," and some time between January 16 and January 19, 1939, the Kuskys went to the office of Kelstuto, where Heald presented the new mortgage papers for them to sign. After the Kuskys saw in Heald's possession the two old mortgages and the agreement papers that they had executed and that belonged to Lithuania, they executed the new mortgage. Heald then presented a check payable to the Kuskys for $10,800.56 executed by Kelstuto and told the Kuskys to indorse it, which they did. At that time the Kuskys had no knowledge as to the sum prior

refinancing transactions between Ewald and Lithuania hereafter referred to. The Kaskys never had possession of the check and Ewald told them that he would deliver it to plaintiffs in payment of the old mortgages. On January 31, 1939, Ewald deposited the check in the account of John P. Ewald Realty Company, Inc., and it was promptly paid by the bank. On February 2, 1939, Ewald sent to plaintiffs by Estella Thompson a check reading as follows:

"JOHN P. EWALD CO., INC. No. 1761
3236 S. Halsted St.
Calumet 4118

Chicago, Feby 1 1939

N S F

Pay to the
Order of Liq. of Lith B L & H Assn $10717.91

Ten Thousand Seven hundred Seventeen 91/100 Dollars

JOHN P. EWALD REALTY CO., INC.

THE DISTRICT NATIONAL BANK
2-415 OF CHICAGO 2-415 [Signed] By John P. Ewald"
7 CHICAGO, ILLINOIS 7

As we have heretofore stated, the two mortgages and the agreement papers belonging to plaintiffs were not returned to them. The Liquidators accepted the check, although they did not then know the exact amount that was due them, and they thereupon executed and delivered to Miss Thompson releases (drawn by Miss Kuchinskas) of the two mortgages held by Lithuania on the Kaskys' property, and which acknowledged payment in full of the amounts due Lithuania. At the same time Miss Thompson stated to plaintiffs that Ewald requested them not to deposit his check for a few days. Miss Thompson was employed by Keistuto as a general office girl and was also employed by Ewald in his private business. She also worked for plaintiffs on Saturday of each week. She had worked for Lithuania at a time when two of the Liquidators were directors of that association. John Kuchinskas, Jr., one of the Liquidators, is a brother of Irene Kuchinskas. On February 4 the Liquidators were requested by Ewald to withhold the depositing of the check until February 6, 1939. Ewald died, apparently in an unnatural manner, on February 6, about nine or ten o'clock a.m., and on the

refinancing transactions between Ewald and Lithuania hereafter referred to. The Kasiys never had possession of the check and Ewald told them that he would deliver it to plaintiffs in payment of the old mortgages. On January 31, 1939, Ewald deposited the check in the account of John P. Ewald Realty Company, Inc., and it was promptly paid by the bank. On February 2, 1939, Ewald sent to plaintiffs by Estella Thompson a check reading as follows:

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Calumet 4118

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THE DISTRICT NATIONAL BANK
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same morning the Liquidators deposited the check, and later that day they were notified that the check was not good for its face amount, and it was returned to plaintiffs on February 8. The following important facts are undisputed: Prior to the refinancing of the Kaskys mortgages Keistuto refinanced ten mortgages that belonged to the Liquidators and each of the ten transactions was handled in the same manner as the Kaskys transaction; in each of said transactions Ewald executed and delivered to the Liquidators "his checks on said Realty Company in satisfaction of their mortgages." In all of the ten prior transactions, however, the checks of the Realty Company had been honored.

While the appeal was pending in this court we allowed, on January 2, 1941, a motion of the Kaskys for leave to offer as additional evidence on their behalf a certified copy of an affidavit of defense and counterclaim, filed November 12, 1940, by the Liquidators in a suit filed against them by Irene Kuchinskas in the Municipal court of Chicago. It appears from this certificate that Irene Kuchinskas filed a suit against Anton Kantrimas, Adam Subaitis and Paul Salterimas, as Liquidators of the Lithuania Building, Loan and Homestead Association, and that the Liquidators filed the following verified counterclaim to the claim of the plaintiff in that suit:

"COUNTERCLAIM.

"Now come Anton Kantrimas, Adam Subaitis and Paul Salterimas, as liquidators of the Lithuania Building, Loan and Homestead Association, and show unto the court the following by way of set-off:

"1. These defendants allege that on and prior to December 23, 1938, the Lithuania Building, Loan and Homestead Association was the owner of a certain agreement of one Mary Kasky, and of a certain other agreement of Peter Kasky and Marie Kasky, his wife; that said agreements were for loans made to said Kaskys as members of said association; that said loans were secured by real estate mortgages; that said Kaskys, being desirous of refinancing said mortgages, did apply to Keistuto Loan and Building Association

same morning the Liquidators deposited the check, and later that day they were notified that the check was not good for its face amount, and it was returned to plaintiffs on February 8. The following important facts are undisputed: Prior to the refinancing of the Kasiys mortgages Kelsato refinanced ten mortgages that belonged to the Liquidators and each of the ten transactions was handled in the same manner as the Kasiys transaction; in each of said transactions Ewald executed and delivered to the Liquidators "his checks on said Reality Company in satisfaction of their mortgages." In all of the ten prior transactions, however, the checks of the Reality Company had been honored.

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"COUNTERCLAIM.

"Now come Anton Kastrimas, Adam Subaitis and Paul Saltertimas, as Liquidators of the Lithuania Building, Loan and Homestead Association, and show unto the court the following by way of set-off:

"1. These defendants allege that on and prior to December 23, 1938, the Lithuania Building, Loan and Homestead Association was the owner of a certain agreement of one Mary Kasiy, and of a certain other agreement of Peter Kasiy and Marie Kasiy, his wife; that said agreements were for loans made to said Kasiys as members of said association; that said loans were secured by real estate mortgages; that said Kasiys, being desirous of refinancing said mortgages, did apply to Kelsato Loan and Building Association

No. 1, for real estate loans upon said real estate, wherewith to pay to these defendants as liquidators, the amounts then due and owing upon said loans; that in connection with the satisfaction of said indebtedness and the receipt of the money due upon said loans, these defendants, then being liquidators of said association, and also John Kuchinskas, Jr., also a liquidator at said time and a brother of Irene Kuchinskas, did engage said Irene Kuchinskas as attorney to attend to said transaction; that thereupon said Irene Kuchinskas requested these defendants to give her said two agreements and mortgages upon said real estate, then being the property of said association; that thereafter said Irene Kuchinskas did also represent said Keistuto Loan and Building Association No. 1, and did make an examination of the title to said premises, for the purposes of the loan to be made by Keistuto Loan and Building Association No. 1, and did also confer with one John P. Ewald, who was secretary of said Keistuto Loan and Building Association No. 1, and did arrange the terms and manner in which said loan was to be made by said Keistuto Loan and Building Association No. 1; that said Irene Kuchinskas, without the consent or approval of Anton Kantrimas and Adam Subaitis, and without authority from the liquidators, delivered said agreements and mortgages to Keistuto Loan and Building Association No. 1, without receiving any cash payment or satisfaction therefor; that said Irene Kuchinskas did also request the said Adam Subaitis and Anton Kantrimas, as liquidators as aforesaid, to take and accept a certain check of John P. Ewald Realty Company in payment and satisfaction of said indebtedness in compromise and settlement with said mortgagors for the sum of $10,717.91; and said Irene Kuchinskas did prepare and executed and cause to be delivered to said liquidators certain releases of said mortgages held by said liquidators as security for the said loan of said Association, and did advise said liquidators that it was proper and safe for them to accept said check of John P. Ewald Realty Company in payment and satisfaction of

No. 1, for real estate loans upon said real estate, warranted to pay to these defendants as liquidators, the accounts then due and owing upon said loans; that in consideration with the satisfaction of said indebtedness and the receipt of the money due upon said loans, these defendants, then being liquidators of said association, and also John Cushinskas, Jr., also a liquidator of said time and brother of Irene Kushinskas, did engage said Irene Kushinskas as attorney to attend to said transaction; that thereupon said Irene Kushinskas requested these defendants to give her said two agreements and mortgages upon said real estate, then being the property of said association; that thereafter said Irene Kushinskas did also represent said Eastsuto Loan and Building Association No. 1, and did make an examination of the title to said premises, for the purpose of the loan to be made by Eastsuto Loan and Building Association No. 1, and did also confer with one John F. Swald, who was secretary of said Eastsuto Loan and Building Association No. 1, and did arrange the terms and manner in which said loan was to be made by said Eastsuto Loan and Building Association No. 1; that said Irene Kushinskas, without the consent or approval of Anton Kuntrimas and Adam Kubaitis, and without authority from the liquidators, delivered said agreements and mortgages to Eastsuto Loan and Building Association No. 1, without receiving any cash payment or satisfaction therefor; that said Irene Kushinskas did also request the said Adam Kubaitis and Anton Kuntrimas, as liquidators as aforesaid, to take and accept a certain check of John F. Swald Realty Company in payment and satisfaction of said indebtedness in compromise and settlement with said mortgagors for the sum of $15,717.91; and said Irene Kushinskas did prepare and executed and cause to be delivered to said liquidators certain releases of said mortgages held by said liquidators as security for the said loan of said association, and did advise said liquidators that it was proper and safe for them to accept said check of John F. Swald Realty Company in payment and satisfaction of

said mortgages; that these defendants, as liquidators, were in all things proceeding and acting upon the advice and direction of their said attorney, Irene Kuchinskas, and her statement and assertion that the same could safely be done and taken, and that it didn't make any difference to them whether the check was that of Keistuto Loan and Building Association No. 1, or of said John P. Ewald Realty Company; and that these defendants, acting in reliance on said statement of their attorney, did take and accept said check of John P. Ewald Realty Company for the sum of $10,717.91 and did sign, execute and deliver releases for said mortgages, which said Irene Kuchinskas did thereupon cause to be recorded; that said check, upon presentation to said bank, was returned 'not sufficient funds.' By reason thereof, said liquidators were deprived of their security upon said real estate, and put to expenses for attorneys' fees and master's fees and court costs, to their damage in the sum of $15,000.00.

"These defendants aver by reason of the failure of Irene Kuchinskas to comply with her aforesaid contract, <u>and by reason of her wrongful acts</u>, they have been damaged, hence bring this suit.

"Lithuania Building, Loan
and Homestead Association,

"By: Adam Subaitis, Anton
Kantrimas, Paul Salterimas

"Liquidators."

(Italics ours.)

<u>It must be noted that plaintiffs made no objection to the filing of this certified copy</u> and on February 18, 1941, they moved for leave to file a certified copy of the judgment entered on the counterclaim in that case, and we reserved decision on this motion until the hearing of the cause. Leave is hereby granted plaintiffs to file this certified copy of the judgment. It recites that plaintiff have judgment on her statement of claim and defendants' counterclaim and that she have and recover from defendants $265 and that execution issue thereon. Plaintiffs state, not in their

said mortgages; that these defendants, as liquidators, were in all things proceeding and acting upon the advice and direction of their said attorney, Irene Kuchinskas, and her statement and assertion that the same could safely be done and taken, and that it didn't make any difference to them whether the check was that of Reliable Loan and Building Association No. 1, or of said John P. Ewald Realty Company; and that these defendants, acting in reliance on said statement of their attorney, did take and accept said check of John P. Ewald Realty Company for the sum of $10,717.91 and did sign, execute and deliver releases for said mortgages, which said Irene Kuchinskas did thereupon cause to be recorded; that said check, upon presentation to said bank, was returned 'not sufficient funds.' By reason thereof, said liquidators were deprived of their security upon said real estate, and put to expenses for attorneys' fees and master's fees and court costs, to their damage in the sum of $15,000.00.

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original brief, filed December 9, 1940, but in the reply brief, filed February 21, 1941, that the counterclaim is wholly immaterial on this appeal and should be stricken from the files, although they have never made a motion to that effect. However, they concede in their reply brief that the Liquidators filed the said counterclaim, and they say: "The Municipal Court suit against the attorney alleges that the attorney, without authority, surrendered the mortgage and recommended to the Liquidators the acceptance of the check which proved to be no good. It was not there claimed that the attorney participated in the fraud or was aware that the check would not be honored. There is no statement in the counterclaim tending to prove the Liquidators had knowledge the check was bad or in any manner ratified the fraud of the mortgagors' agent;" that "the Liquidators have failed to obtain any satisfaction in the Municipal Court suit and there is no bar to the present action by reason of any matter appearing in the pleadings in the Kuchinskas suit." In view of the position taken by plaintiffs in the matter of the counterclaim and their admissions in reference to it, we have a right to consider it, but if we disregard it entirely the instant question, in our judgment, must be decided in favor of the Kaskys.

Estella Thompson testified that in each of the prior ten transactions she delivered a check of the Ewald Realty Company to Liquidators Subaitis and Kantrimas and that they accepted the checks; that the ten transactions took place within a period of about two months prior to the Kaskys transaction. There is no evidence that such a practice was followed by Ewald and Lithuania prior to the time that Lithuania went into liquidation. In the refinancing procedure in the instant case it was never intended by the Liquidators and Ewald that the Kaskys should actually receive the money loaned them by Keistuto or that they should have in their possession and control the check of that association. The Liquidators knew that under the law all funds of Keistuto were required to be deposited in the name of the association in the bank

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or banks designated as depositaries by the treasurer and approved by the board of directors, and when Ewald, on February 2, 1939, tendered the Liquidators the check of the Realty Company and also presented releases to be signed by them (releases prepared by the attorney who represented both plaintiffs and Keistuto), plaintiffs, as liquidators of a building and loan association, must have known that Ewald had not delivered the check of Keistuto to the Kaskys and that he had deposited it in the account of his Realty Company, and they knew, of course, that the check they accepted, without qualification, was the check of that company, but they followed the procedure that had been established between Ewald and plaintiffs in the refinancing matters. Such a procedure was made possible because the Liquidators repeatedly acquiesced in Ewald's criminal conduct. They allowed him to act for them in all of the refinancing transactions because of their belief that he was financially sound. When they accepted the check in the Kaskys transaction they raised no question as to the correctness of the amount Ewald figured was due them. While in the verified counterclaim filed in the Municipal court suit they state that they elected to take the Realty Company's check because they were advised to do so by Miss Kuchinskas, they made no such claim in their testimony in the instant proceedings. If Ewald was not acting as their agent in the matter, when the check of the Realty Company was tendered them they would have declined, as Liquidators of Lithuania, to receive it, and would have demanded a check of Keistuto, which association was sound financially. But they followed their usual practice and accepted the check of the Realty Company in payment and delivered the releases, which acknowledged payment of their two mortgages, without even directing or requesting that the releases be withheld from record until the check of the Realty Company was paid, and they twice agreed to postpone the depositing of the check. One of the Liquidators testified that they accepted the check without question or inquiry because the Realty Company's checks in the other ten transactions had been paid. It is significant that

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the check was not deposited until the day that Ewald died. The Liquidators realized that the fact that they held the check for five days would, if not explained, tend to show that they were giving Ewald time to make his check good, and in explanation of their conduct they testified that the delay in depositing the check was due to the fact that Ewald was to give them a statement. That this weak explanation was an afterthought clearly appears from the fact that they had not received a statement from Ewald at the time they deposited the check. The record shows that the Ewald Realty Company's bank deposit from the date of the check, February 1, 1939, until the death of Ewald was never sufficient to meet the check. This fact shows the reason for the two requests to withhold the deposit of the check. No other reasonable conclusion can be drawn from the evidence than that the delay in depositing the check was due to the willingness of the Liquidators to give Ewald time to make the check good. His death forced the deposit. If, when they accepted the check from Ewald they considered that he was acting solely as the agent of the Kaskys and Keistuto in the matter of the payment to plaintiffs, would they have dared to imperil the rights of the Kaskys or Keistuto by holding the check for five days? If they had received a check of Keistuto they would have deposited it in the ordinary course of business. The argument of plaintiffs that the releases of the mortgages were obtained from them by fraud because of the fact that Ewald gave them a check when there were not sufficient funds in the bank to meet it and that as Ewald was the agent of the Kaskys and not their agent equity will hold that releases so obtained are inoperative and no defense to a foreclosure, is without merit. In view of their verified counterclaim in the Municipal court case plaintiffs' position as to the Kaskys is a bold one to say the least. No other reasonable conclusion can be drawn from the facts and circumstances than that plaintiffs elected to have Ewald represent them in the matter of collecting the mortgage money due them from the Kaskys. Had the Kaskys,

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immediately after they indorsed the check and left it with Ewald, notified plaintiffs as to what they had done, the established procedure would undoubtedly have been followed.

The contention of the Kaskys that "the injunction procured by the plaintiffs, relating to the mortgage proceeds in the bank account of John P. Ewald Realty Company, Inc., is a recognition and affirmance of the agency of John P. Ewald in collecting the mortgage money for the plaintiffs," is not without merit. The master found that plaintiffs were entitled to an equitable lien upon the bank deposit of $3,675.45 and recommended that this sum, after deducting the expenses of the bank, $12.70, be ordered paid to plaintiffs and be applied on account of the indebtedness found due them. The decree confirmed the master's report as to the bank deposit and the notice of appeal filed by plaintiffs seeks to have the master's report approved in all respects.

That part of the decree dismissing the complaint as amended as to defendants Peter Kasky, Mary Kasky and Marie Kasky for want of equity is affirmed.

As to the appeal of Keistuto: It strenuously contends that the chancellor erred in holding that in the Kaskys transactions Ewald acted solely as the agent of Keistuto and that it is liable to plaintiffs for the amount of the Realty Company's check; that the evidence shows that the Liquidators recognized Ewald as their agent in the Kaskys matter and the check they received from him was his settlement with them as his principals and that they acquiesced in the fraudulent manner in which Ewald handled the check of Keistuto. It further contends that there is no evidence in the record that Keistuto's officers or directors, other than Ewald, were aware of the manner in which Ewald and the Liquidators were handling the refinancing matters; that Ewald had charge of the office work of Keistuto and after the check made payable to the Kaskys was signed by the proper officers of Keistuto, neither its directors nor officers, save Ewald, saw the check again, nor did they see any of

immediately after they indorsed the check and left it with Ewald, notified plaintiffs as to what they had done, the established procedure would undoubtedly have been followed.

The contention of the Kaskys that "the injunction procured by the plaintiffs, relating to the mortgage proceeds in the bank account of John P. Ewald Realty Company, Inc., is a recognition and affirmance of the agency of John P. Ewald in collecting the mortgage money for the plaintiffs," is not without merit. The master found that plaintiffs were entitled to an equitable lien upon the bank deposit of $3,675.45 and recommended that this sum, after deducting the expenses of the bank, $12.70, be ordered paid to plaintiffs and be applied on account of the indebtedness found due them. The decree confirmed the master's report as to the bank deposit and the notice of appeal filed by plaintiffs seeks to have the master's report approved in all respects.

That part of the decree dismissing the complaint as amended as to defendants Peter Kasky, Mary Kasky and Marie Kasky for want of equity is affirmed.

As to the appeal of Kelstuto: It strenuously contends that the chancellor erred in holding that in the Kasky transactions Ewald acted solely as the agent of Kelstuto and that it is liable to plaintiffs for the amount of the Realty Company's check; that the evidence shows that the liquidators recognized Ewald as their agent in the Kasky matter and the check they received from him was his settlement with them as his principals and that they acquiesced in the fraudulent manner in which Ewald handled the check of Kelstuto. It further contends that there is no evidence in the record that Kelstuto's officers or directors, other than Ewald, were aware of the manner in which Ewald and the liquidators were handling the refinancing matters; that Ewald had charge of the office work of Kelstuto and after the check made payable to the Kasky was signed by the proper officers of Kelstuto, neither its directors nor officers, save Ewald, saw the check again, nor did they see any of

the checks of the association that had been issued in the prior ten transactions after they had been turned over to Ewald, and that all of these checks, after they were returned by the bank to Keistuto, were filed by Ewald in the files of the association; that there is no evidence that would even tend to show that the directors or other officers of Keistuto had actual knowledge of the procedure followed by Ewald and the Liquidators in the refinancing matters. Much of the evidence that we have heretofore stated applies also to the instant question. That the actual manner in which Ewald and the Liquidators handled the refinancing matters was not brought home to the directors or officers of Keistuto is not seriously disputed. Plaintiffs call attention to the testimony of Miss Thompson to the effect that Ewald performed all the duties that pertained to the association, "that is, he dictated mortgages and took care of shareholders and made loans;" to the testimony of the treasurer of Keistuto that Ewald did all the office work and kept the business going; that he kept the books and the directors held a meeting only once a week; that Ewald attended to all people who wanted to make loans and he closed the deals at the office of the association; that Ewald was in charge of the office and when checks were signed they were left at the office; that the attorney of the association drew up all mortgages. Plaintiffs cite Prairie State Loan Ass'n v. Nubling, 170 Ill. 240, in support of their position that the decree, so far as it applies to Keistuto, should be affirmed, but that case, under the facts, has no application to the instant proceeding.

Miss Thompson, one of the bookkeepers for Keistuto, had some knowledge as to the manner in which Ewald handled the refinancing matters and during the trial counsel for plaintiffs contended that "this young lady is the Keistuto;" that her knowledge is the knowledge of Keistuto, but plaintiffs do not make this contention in their briefs. As we have heretofore stated, Miss Thompson worked as a bookkeeper for Lithuania, Keistuto, and Ewald Realty Company. She had no authority, express or implied, to handle any matters for

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Keistuto and there is no evidence that she ever reported to its directors or other officers the manner in which Ewald was handling the refinancing matters. Indeed, the record does not show that she ever came in contact with the directors or other officers in a business way. But if we assume that the directors and other officers of Keistuto were negligent in not discovering and stopping the procedure followed by Ewald and the Liquidators in the refinancing matters, such negligence, in view of the other facts and circumstances in evidence, would not justify the chancellor in awarding to plaintiffs what amounts to a common law judgment against Keistuto for $7,065.16. That Ewald embezzled the amount of the check when he deposited it in the Realty Company's bank account is clear, but there is no evidence that would warrant a finding that the directors and other officers of Keistuto approved the said embezzlement, or that they knew of it until after Ewald died. We are unable to reconcile two important parts of the decree. In one the chancellor found that the sum of $3,675.45 on deposit with the District National Bank of Chicago in the account of the Ewald Realty Company (less $12.70) is the property of Keistuto, "having been wrongfully taken from it by the said John P. Ewald;" in another part of the decree the chancellor found that Ewald in thereafter drawing the check for $10,717.91 on the account of the Ewald Realty Company, and which was made payable to plaintiffs, acted solely as the agent of Keistuto, and the common law judgment against Keistuto is based upon that finding. In our opinion, the chancellor correctly found that Ewald embezzled the amount of the Keistuto check to the Kaskys when he deposited it in the Realty Company's account, but incorrectly found that Ewald, after the embezzlement, again became the lawful agent of Keistuto to pay out the money that he had embezzled. No other reasonable conclusion can be drawn from the evidence bearing upon the eleven refinancing transactions between the Liquidators and Ewald than that the Liquidators knew that Ewald was depositing in the Ewald Realty Company account the

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checks issued by Keistuto in said transactions, and it is conceded that Ewald tendered to the Liquidators checks upon the account of the Realty Company in the eleven transactions. If the Liquidators had refused to accept the checks tendered to them by Ewald, as they should have done, and if they had reported to the directors or other officers of Keistuto what Ewald was doing, there would have been no necessity for the present proceeding. A decent regard for the rights of Keistuto, the Kaskys, and their own shareholders demanded that they refuse to carry on the refinancing transactions in the method that was employed. If the Liquidators lose money as the result of the instant transaction they lose it not through any negligence or acts of the directors or other officers of Keistuto, but because they elected to have Ewald represent them in making the collections in the eleven refinancing matters and because they were satisfied to accept his check in payment of the amounts due them. As an excuse for accepting the check in question Liquidator Subaitis testified, "All of his [Ewald's] checks had cleared." We feel impelled to state that the Liquidators, in the instant transaction, were guilty of conduct more reprehensible than gross negligence. They should be made to respond to the Lithuania shareholders for any losses sustained in the Kaskys matter.

No appeal has been taken from that part of the decree that orders the District National Bank of Chicago to pay to plaintiffs the sum of $3,662.75, which was on deposit with the District National Bank of Chicago in the account of the John P. Ewald Realty Company, Inc.

The decree of the Superior court of Cook county is affirmed save as to that part which finds that Ewald in drawing the check for $10,717.91 on the account of the John P. Ewald Realty Company, Inc., and which was made payable to plaintiffs, acted solely as the agent of Keistuto and that said association is liable to plaintiffs for the amount of the check, and which adjudges and decrees that defendant Keistuto pay to plaintiffs the sum of $7,055.16. As to said part

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No appeal has been taken from that part of the decree that orders the District National Bank of Chicago to pay to plaintiffs the sum of $3,662.75, which was on deposit with the District National Bank of Chicago in the account of the John P. Swaid Realty Company, Inc.

The decree of the Superior court of Cook county is affirmed save as to that part which finds that Swaid in drawing the check for $10,717.91 on the account of the John P. Swaid Realty Company, Inc., and which was made payable to plaintiffs, acted solely as the agent of Reistetto and that said association is liable to plaintiffs for the amount of the check, and which adjudges and decrees that defendant Reistetto pay to plaintiffs the sum of $7,055.16. As to said part

the decree is reversed and the cause is remanded with directions to the chancellor to dismiss the complaint as to defendant Keistuto for want of equity.

DECREE AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

the decree is reversed and the cause is remanded with directions to the chancellor to dismiss the complaint as to defendant Kelstutto for want of equity.

DECREE REVERSED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

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317 I.A. 658

GEORGE ORTSEIFEN and WALTER A. WADE, Surviving Executors of the Estate of Michael Espert, Deceased, and Trustees under the Last Will and Testament of Michael Espert, Deceased, Appellants,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
v.	
THE CITY OF CHICAGO, a Municipal Corporation, Appellee.	

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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action at law to recover damages which resulted to real estate belonging to plaintiffs as a result of the construction of (1) the north approach or viaduct on Wabash avenue to the Wabash avenue bridge; (2) the construction of a viaduct in Kinzie street in front of plaintiffs' property running from the upper level of the Wabash avenue viaduct to the Central Chicago Garages, Inc.; (3) the changes of grade of certain streets and sidewalks adjoining plaintiffs' property and the alley in the rear of the property, which changes were a part of the construction of the Wabash avenue viaduct or approach. In a trial before the court and a jury a verdict was returned finding defendant guilty and assessing plaintiffs' damages at $5,000. Plaintiffs' motion for a new trial was denied and they appeal from a judgment entered upon the verdict.

No issue is raised upon the pleadings. Plaintiffs' property is known as 18-20 East Kinzie street, Chicago. It is on the north side of the street and 100 feet west of Wabash avenue. Kinzie street is the first east and west street north of the Chicago river and North State street is the first street west of plaintiffs' property, which has a frontage of 50 feet and a depth of 100 feet extending back to an east and west alley at the rear of the premises. The property is improved with a five-story and basement brick building. The building, prior to the commencement of the construction work in question, was occupied by various tenants, all of whom were

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engaged in light manufacturing. The building had two entrances on the front, one at the center of the building on the first floor and one on the westerly side of the building leading to a stairway to the upper floors and to a passenger elevator which extends from the first floor entrance to the top floor. There is a freight elevator in the rear of the building which extends from the basement to the top floor. In 1925 the building was completely remodeled and renovated and at that time the passenger elevator in the front of the building was installed. The general neighborhood is devoted to light manufacturing, warehousing, trucking and shipping. In 1930, prior to the time the public work in question was commenced, Kinzie street in front of plaintiffs' property, including the sidewalk, was level and unobstructed. The first floor of the property was 1.3 feet above the level of the sidewalk. Wabash avenue stub-ended at the south curb line of Kinzie street and at said line there was located a receiving freight station and teaming track for the reception of freight for the Northwestern Railroad Company. Wabash avenue extended north from this point several blocks, where it intersected Rush street. It was level, unobstructed, and at the same level as Kinzie street. The alley in the rear of plaintiffs' property was also level its entire length between State street and Wabash avenue and was at the same approximate grade as Wabash avenue and Kinzie street. On July 16, 1930, the Chicago city council passed an ordinance for the construction of a bridge across the Chicago river at Wabash avenue and for the construction of a viaduct or approach thereto in Wabash avenue north of the river. On July 29, 1930, a second ordinance, amending the first one in certain details, was adopted. In the fall of 1930 work was begun upon the construction of the said north viaduct and approach, which involved, inter alia, the lowering of the grades of the surrounding streets, including East Kinzie street. The work was completed about August 1, 1931, and the viaduct then occupied the entire width of Wabash avenue from Kinzie street to East Grand avenue three blocks north of plaintiffs' property. At East Grand

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avenue the viaduct comes down to the old level of Wabash avenue. As a result of the construction Kinzie street at its intersection with Wabash avenue was depressed 7 feet; at the westerly end of plaintiffs' property it was depressed 2 feet, 8 1/2 inches, and at the easterly end of the property 4 feet, 8 3/16 inches. The depression in Kinzie street began at a point 85 feet west of plaintiffs' property and declined in an easterly direction to its intersection with Wabash avenue at a grade of 4 per cent. The viaduct in Wabash avenue was built of steel and concrete. In order to support it there were constructed in said avenue three lines of pillars or columns, one line being located in the center of said avenue and a line being located in the sidewalk area on each side of the street. The columns in the center of the roadway are from 34 to 44 feet apart and are approximately 14 inches square. The roadway of said avenue was narrowed from 38 feet to 36 feet. The alley in the rear of plaintiffs' property at its intersection with Wabash avenue was depressed 3.8 feet so as to meet the lowered grade of Wabash avenue. The alley from the intersection with Wabash avenue then extended upward in a westerly direction at a 7 1/2 per cent grade for 32 feet, and reached its former level about 75 feet west of said avenue. On the south side of East Kinzie street extending eastward from State street is a garage building known as the Central Chicago Garages, Inc. On March 18, 1931, the Chicago city council passed an ordinance providing for the construction of a ramp or viaduct in East Kinzie street extending from the upper level of the Wabash avenue viaduct westerly to the garage building. The viaduct was built at the cost and expense of the Garage company and permission was granted that company to build it by the City in consideration of and in settlement of damages to its property claimed by the Garage company arising out of the construction of the North Wabash avenue viaduct approach and the changes in grade in Kinzie street. As a result of the ordinance of March 18, 1931, a ramp or viaduct was constructed in East Kinzie street immediately opposite plaintiffs' property. It occupies the entire south half of East

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Kinzie street and extends from the Wabash avenue viaduct westerly a distance of 143 feet along the center line of East Kinzie street and 119 feet along the south line of East Kinzie street. It connects one of the upper floors of the garage building with the North Wabash avenue viaduct. It is constructed of steel and concrete and is approximately 38 feet 6 inches in width and extends over the south sidewalk of East Kinzie street and over 25 or 26 feet of the roadway. It is supported by 14 steel columns, 7 of which are constructed in the center of East Kinzie street directly opposite plaintiffs' property, and 7 in the south sidewalk area of said street. The columns or pillars supporting the ramp are approximately 17 feet apart and three of the pillars are directly opposite plaintiffs' property. The work on this ramp was completed about August 1, 1931. Prior to the said improvements there were no railway tracks at the intersection of Wabash avenue and Kinzie street but as a result of the construction of the viaduct the tracks of the Northwestern Railroad which lie immediately north of the river between Kinzie street and the river were moved 50 or 60 feet in a northerly direction, and after the completion of the work there was one lead track in the intersection of Kinzie street and Wabash avenue, and the teaming tracks and freight receiving station of the Northwestern Railroad, which previously were located at the south side of Kinzie street at its intersection with Wabash avenue and almost directly opposite plaintiffs' property, were no longer there. After the grades of the street had been lowered plaintiffs were forced to make certain temporary changes in the front of their property. Seven steps were constructed in the center entrance on Kinzie street and four steps in the west entrance and the front of the building on the first floor was reconstructed. These temporary changes, alone, cost plaintiffs about $2,500.

During the trial defendant conceded that plaintiffs' property had been damaged, but refused to stipulate as to the amount of the damages. It here concedes that plaintiffs' property was damaged

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and attempts to justify the amount of the damages fixed by the jury.

Plaintiffs strenuously contend that the amount of the damages fixed by the verdict of the jury is grossly inadequate and against the manifest weight of the evidence. After a careful consideration of all of the evidence bearing upon this contention we are satisfied that the contention is a meritorious one and that it would be a serious injustice to plaintiffs to permit the verdict to stand. To quote the following from our opinion in Boulevard Bridge Bank v. City of Chicago, 304 Ill. App. 190, 203: "Section 13 of Article II of the Constitution of 1870 provides that 'Private property shall not be taken or damaged for public use without just compensation.' In People ex rel. Farwell v. Kelly, 361 Ill. 54, 58, the court quotes with approval the following from Roe v. County of Cook, 358 Ill. 568: 'The constitutional right of all property owners to compensation when their property has been damaged or taken for public use is one of the most salient provisions of our bill of rights,' and states (p. 59): 'The provisions of section 13 of article 2 of the constitution are self-executing, neither requiring any legislation for their enforcement nor susceptible of impairment by legislation or ordinance. (Roe v. County of Cook, supra, and authorities there cited.)'" In the light of the evidence in this case it is idle for defendant to argue that $5,000 was just compensation to plaintiffs for the damages to their property caused by the public improvements in question. While the construction of the Wabash avenue bridge is a great benefit to the public and undoubtedly benefits certain properties in the loop and also properties on Wabash avenue and adjoining streets north of Grand avenue, plaintiffs' property, because of its situation, was seriously damaged by the construction. As the case may be tried again we refrain from commenting upon the evidence that bears upon the question of damages.

We do not deem it necessary to pass upon other points urged

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We do not deem it necessary to pass upon other points urged

by plaintiffs in support of their contention that a new trial should be awarded them.

The trial court erred in denying plaintiffs' motion for a new trial and the judgment of the Circuit court of Cook county entered April 3, 1940, is reversed and the cause is remanded for a new trial.

JUDGMENT ENTERED APRIL 3,
1940, REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

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